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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

NICHOLAS LASSONDE,
Petitioner,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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160 pp

QUESTIONS PRESENTED

Based solely on his grade point average, Petitioner earned the right to deliver a salutatorian address at his public high school graduation ceremony. In his proposed address, Petitioner expressed his view that a personal relationship with God is the key to success and happiness. School officials objected to Petitioner's expression of his religious views and engaged in a line-by-line excision of the comments they deemed too "proselytizing" or "sectarian." Petitioner presents the following questions:

I. Whether the Establishment Clause requires public high school officials to censor religious content from a student's graduation speech where the student speaker is chosen based on neutral criteria, the student retains primary control over the content of the speech, and the school's policy is not devised for the purpose of facilitating religious speech.

II. Whether this Court's holdings in *Lee v. Weisman* and *Santa Fe v. Doe* must be extended to preclude public high school student speakers from engaging in pure speech from a religious viewpoint where the student speaker is chosen based on neutral criteria, the student retains primary control over the content of the speech, and the school's policy is not devised for the purpose of facilitating religious speech.

III. Whether the First Amendment's prohibition of viewpoint-based censorship of religious speech in a limited or nonpublic forum requires public high school officials who seek to avoid an appearance of endorsement of the religious content of student speech to employ lesser restrictive alternatives to censorship, such as disclaiming endorsement of the religious views.

PARTIES TO THE PROCEEDING

The Petitioner in this matter is Nicholas Lassonde, an individual.

The Respondents are Pleasanton Unified School District, a public school district duly organized and existing under the laws of the State of California; Mary Frances Callan, who is sued individually and as Superintendent of Pleasanton Unified School District; Jim Negri, who is sued individually and as Assistant Superintendent of Pleasanton Unified School District; and Bill Coupe, who is sued individually and as Principal of Amador Valley High School, a secondary institution administered by Pleasanton Unified School District.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Nicholas Lassonde respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in *Lassonde v. Pleasanton Unified School District, et al.*, 320 F.3d 979 (9th Cir. 2003).

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 320 F.3d 979 and appears as Appendix A hereto. The decision of the District Court is reported as *Lassonde v. Pleasanton Unified School District*, 167 F.Supp.2d 1108 (N. Dist. Ca. 2001), and appears as Appendix B hereto.

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over Petitioner's federal claims pursuant to 28 U.S.C. § 1331. The District Court's Order dismissing Petitioner's lawsuit and Judgment were filed October 2, 2001. See Appendices B and C hereto, respectively. Petitioner filed timely Notice of Appeal on October 31, 2001. *See* FED. R. APP. PROC. 4(a)(2). The Ninth Circuit Court of Appeals filed its Opinion on February 19, 2003, and Petitioner accordingly timely files this Petition pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims arise under the First Amendment to the United States Constitution, which provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech....

This case also involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part that "[N]o state shall... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner brought this action under the Civil Rights Act, 42 U.S.C. § 1983, challenging Respondents' deprivations, under color of state law, of his federal constitutional rights of free speech, free exercise of religion, and equal protection guaranteed by the First and Fourteenth Amendments to the United States Constitution.

B. Factual History

By achieving a cumulative grade point average of 4.24, Petitioner earned the position of being one of two salutatorians for his graduating Class of 1999 from Amador Valley High School in Pleasanton, California. ("AVHS"). Plaintiff's Separate Statement of Uncontroverted Material Facts and Response to Defendants' Separate Statement of Facts ("Plaintiff's SSUMF"), 9 (Record Excerpts ("R.E.") at 119); App. G8; Defendants' Separate Statement of Material Facts ("Defendants' SSUMF"), 1 (R.E. at 026); App. F2. The AVHS Valedictorian and Salutatorian, chosen solely on the basis of their earned grade point averages, traditionally present speeches at the graduation ceremonies. Plaintiff's SSUMF, Fact 10 (R.E. at 119); App. G8. On May 19, 1999, the Principal

of AVHS, Respondent Bill Coupe, informed Petitioner that he was one of two Salutatorians. According to longstanding AVHS tradition, Principal Coupe informed Petitioner that he could give a speech at the graduation ceremony. Plaintiff's SSUMF, Fact 11 (R.E. at 119); App. G9.

Coupe and the other Respondents gave Petitioner no guidelines for the topic of his speech, except for the requirement that it not be profane. Nor was Petitioner or his legal counsel informed of any school policy with respect to the content of graduation speeches. Petitioner was informed, however, that Principal Coupe wanted to review the speech prior to the ceremony. Defendants' SSUMF, 2 (R.E. at 026); App. F2; Plaintiff's SSUMF, 12 (R.E. at 119); App. G9.

Petitioner determined that his speech would discuss the disasters and horrors of the past thirty years and exhort his fellow graduates to work toward a better future. The speech he composed included quotations from Psalm 146:3-9 and Romans 6:23 of the Bible, and expressed Petitioner's desire for his fellow graduates to develop personal relationships with God through faith in Christ in order to better their lives. Plaintiff's SSUMF, 13 (R.E. at 119-120); App. G9-10; Defendants' SSUMF, 3 (R.E. at 026); App. F3.

Petitioner subscribes to the evangelical Protestant Christian faith. He possesses a conviction that a personal relationship with God through His only Son, Jesus Christ, is essential for eternal salvation and for peace in this life. Plaintiff's SSUMF, Fact 7 (R.E. at 118); App. G8. Petitioner drafted his speech and chose these references in accordance with his religious convictions that compel him to give credit and glory to God in all circumstances and to spread the Word of God to others. Plaintiff's SSUMF, 14 (R.E. at 120); App. G10.

On June 16, 1999, Respondent Coupe called Petitioner into his office to review his graduation speech. Principal Coupe said that he planned to consult with the school's lawyers about the speech because of its references to God and Jesus. Plaintiff's SSUMF, 15 (R.E. at 120); App. G10. On June 17, 1999, Principal Coupe, Assistant Superintendent Respondent Jim Negri and Pleasanton Unified School District ("PUSD") Counsel Karen Rezendes-Tannehill informed Petitioner that he could not present certain portions of the speech because they constituted "proselytizing" or "preaching." They told Petitioner that if he refused to revise his speech to remove the offending portions, he would not be permitted to deliver a speech at all. Plaintiff's SSUMF, 16 (R.E. at 120); App. G10-11; Defendants' SSUMF, 4 (R.E. at 027); App. F3-4.

Mr. Coupe informed Petitioner that the sectarian, proselytizing comments contained in his speech were not constitutionally permissible at a public high school graduation ceremony. More specifically, Mr. Coupe and Ms. Rezendes-Tannehill advised Petitioner that references to God, as they related to his own beliefs, were permissible but that "preaching," or "proselytizing" speech violated the Constitution. Defendants' SSUMF, 4 (R.E. at 027); App. F3-4. Ms. Rezendes-Tannehill advised Petitioner via correspondence dated June 17, 1999, that "allowing [Petitioner] to deliver the attached speech would substantially interfere with the school's efforts to honor the philosophies and faiths of all of its students." Declaration of Steven N. H. Wood in Support of Motion, Wood Dec. para. 2 and Ex. A (R.E. at 077); App. I2. Ms. Rezendes-Tannehill made the decision as to which portions of the speech constituted "proselytizing" or "preaching" and circled those portions for excision. *Id.* (R.E. at 078-079).

On June 17, 1999, the day before the graduation, Petitioner and his legal counsel participated in an appeal hearing held before the Superintendent's designee, Respondent Assistant Superintendent

Jim Negri, in which the parties discussed the District's position on Petitioner's speech. Petitioner and his counsel asserted that school officials' censorship violated Petitioner's civil rights, and explained that the District could avoid any perceived Establishment Clause problem by providing a standard disclaimer to clarify that the student speakers at graduation ceremonies did not represent the views of PUSD. Plaintiff's SSUMF, 17-18 (R.E. at 120); App. G11-12. Petitioner's counsel discussed how this action would minimize the risk to the school by allowing the school to, on one hand, negate any appearance of endorsement of the "proselytizing" content of the speech and, on the other, keep school authorities from becoming entangled in determining which portions of the speech were excessively "proselytizing" or "sectarian." Plaintiff's SSUMF, 19 (R.E. at 120-121); App. G12. PUSD maintained its position and rejected the use of a disclaimer. Plaintiff's SSUMF, 20 (R.E. at 121); App. G12. Respondents stated that "no proselytizing would be allowed" and that it was "okay to thank God but not to preach." Plaintiff's SSUMF, 21 (R.E. at 121); App. G12.

AVHS held its graduation ceremony for the Class of 1999 off campus at the Alameda County Fairgrounds Amphitheater on June 18, 1999. Petitioner presented his speech at the graduation ceremony, omitting the portions that Respondents had forbidden him from presenting. When he came to both censored portions, he informed the audience that school officials had not permitted him to give that part of the speech because they deemed it "inappropriate." He stated that copies of the uncensored speech would be available outside the ceremony afterwards and posted on his web site and that he would be presenting the speech at his church that Sunday. Plaintiff's SSUMF, 22-23 (R.E. at 121); App. G12-13.

At the graduation ceremony, Petitioner's co-Salutatorian was permitted to state in his graduation speech, "With all the success I have obtained, I owe a lot of thanks to others who have inspired me

and assisted me. First, thank you Allah for making me mentally awake and morally straight." Declaration of Steven N. H. Wood, at 4, para. 8 (R.E. at 075); App.I4. The Valedictorian also spoke at the ceremony. *Id.*

As a result of the Respondents' censorship, Petitioner felt that his views as a Christian were disfavored by the school and that, because of his status as a religious individual, he alone among the student speakers was subjected to censorship. Petitioner felt, and still feels, that he was denied a right he had earned – the right to express who he was and how he came to achieve the honor of being Salutatorian – based solely on his Christian viewpoint. Plaintiff's SSUMF, 24 (R.E. at 121-122); App. G14. Although Petitioner was able to present the censored version of the speech, he felt, and still feels, that the censored portions were the most important part of the speech, for they contained the central message that explained Petitioner's identity as a person and answered the question implicitly addressed in any graduation speech: how he achieved his success, and how others might emulate it. He believed, and sought to state, that success and happiness depend not on material wealth or personal fulfillment, but on experiencing the spiritual meaning of life as it is stated in the Westminster Catechism – "To know God and to enjoy Him forever." Plaintiff's SSUMF, 25 (R.E. at 122); App. G14-15.

C. Procedural History

On June 16, 2000, Petitioner filed a complaint against the school district and school officials, invoking federal-question jurisdiction under 28 U.S.C. § 1331. *See* App. D (Complaint). Petitioner alleged that school officials' censorship of his graduation speech violated his rights under the First and Fourteenth Amendments to the United States Constitution. App. D7-D9, ¶¶ 25-31. The parties submitted cross-motions for summary

judgment. On October 2, 2001, the District Court entered its order denying Petitioner's motion and granting Respondents' motion. 167 F.Supp.2d at 1109; App. B1.

Addressing Petitioner's claims against the individual Defendants, the court acknowledged the two-step analysis of *Saucier v. Katz*, 533 U.S. 194 (2001), for determining whether government officials enjoy qualified immunity. 167 F.Supp.2d at 1111 (quoting *Saucier*, 533 U.S. at 201); App. B6. The District Court disposed of the case solely on the first step of *Saucier*, ultimately holding that none of Petitioner's constitutional rights were violated. *Id.* at 1114; App. B12. The court thus declined to reach the second step of the *Saucier* analysis. *Id.* at 1114 (whether right was clearly established). Consequently, the sole issue on appeal was whether the District Court had properly concluded that Respondents had not violated Petitioner's constitutional rights when they censored his salutatorian speech of religious references.

The District Court disposed of Petitioner's free speech and religious exercise claims by holding that the Ninth Circuit's decision in *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000), *cert. den.*, 532 U.S. 905 (2001), squarely controlled the case. 167 F.Supp.2d at 1112; App. B7. The court relied on the Ninth Circuit's holding that "even assuming that the [school district's] graduation ceremony was a public or limited public forum, the defendants' actions did not violate [the student's] freedom of speech because they were necessary to avoid violating the Establishment Clause." *Id.* The court rejected Petitioner's urging that *Cole* was distinguishable because it had not presented an opportunity to consider whether school officials were required to employ a disclaimer as a less restrictive means of furthering the State's interest in avoiding the appearance that it endorsed religion. *Id.* at 1112-13:

> Although the Ninth Circuit's opinion in *Cole* made no specific reference to disclaimers, it concluded that "the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause." Thus, the Ninth Circuit implicitly rejected Plaintiff's argument that a disclaimer would have been effective. If, as Plaintiff argues, a school district could avoid a constitutional violation simply by disclaiming endorsement of the contents of students' speeches, then censoring a student's proselytizing speech would not have been "necessary."

Id. at 1113 (citations omitted); App. B9. The District Court thus ruled that *Cole* stands for the proposition that no less restrictive means short of complete censorship is available to further the government's interest in avoiding an appearance of endorsement.

The District Court further stated that it "might depart from the Ninth Circuit's [*Cole*] decision if subsequent controlling law or precedent superseded the reasoning of [*Cole*]." *Id.* at 1113, n. 9; App. B11. However, the court found no such superseding precedent in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Supreme Court's recent decision requiring access to a limited public forum of public school meeting facilities for an evangelical children's club in view of the factual distinctions between the two cases. *Id.*

The Ninth Circuit Court of Appeals affirmed, holding that the lower court had correctly concluded that *Cole* required school officials to censor students' graduation speeches of proselytizing religious statements in order to avoid an Establishment Clause violation. 320 F.3d at 979, 983; App. A6. The court then reviewed and affirmed the reasoning that led to the holding in *Cole*. First, the fact that school officials retained plenary control of the

graduation ceremony by virtue of their involvement in selecting speakers, reviewing speeches and controlling the facilities meant that the student speaker's speech would bear the school's imprint. *Id.* (quoting *Cole*, 228 F.3d at 1103); App. A8. Second, allowing the sectarian speech "would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice." *Id.* at 984 (quoting *Cole* at 1104); App. A8. The Ninth Circuit's analysis in *Cole*, which ultimately produced its decision in Petitioner's case, was based upon this Court's decisions in *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *See Cole*, at 1101; App. A7.

Based upon a review of the excised portions of Petitioner's speech, the Ninth Circuit found that, as in *Cole* and *Lee*, a reasonable dissenter in attendance at the ceremony "could have felt that silence signified approval or participation." 320 F.3d at 984. "Forcing a dissenter to make the choice between attending such an event and participating in a religious practice with which the dissenter does not agree is not constitutionally permissible." *Id.* (citing *Lee*, 505 U.S. at 595-96); A9.

The court rejected Petitioner's argument that a written disclaimer of school endorsement of the content of students' graduation speeches was an appropriate resolution of Respondents' Establishment Clause concerns. *Id.* First, the court stated, *Cole* implicitly foreclosed that argument by holding that school officials' censorship of the student's speech was necessary to avoid an Establishment Clause violation. *Id.* (citing *Cole* at 1101). Second, the court found that this implicit holding of *Cole* was correct because a disclaimer would not address the coercion concerns underlying both *Cole* and this Court's decision in *Lee*. *Id.*

Regardless of any offered disclaimer, a reasonable dissenter

> still could feel that there is no choice but to participate in the proselytizing in order to attend high school graduation. Although a disclaimer arguably distances school officials from "sponsoring" the speech, it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way.

Id. at 984-85; App. A10. Third, the court apparently reasoned that school officials had provided a less restrictive alternative to absolute censorship by allowing Petitioner to distribute copies of his speech outside the graduation ceremony. *Id.* at 985; App. A10.

The Ninth Circuit stated that *Cole* would control similar factual scenarios unless some later decision from this Court undermined *Cole*'s logic. *Id.* The court rejected Petitioner's argument that this Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) had done so. *Id.* Although the Court held in *Good News Club* that exclusion of speakers from a forum because of their religious viewpoint was unconstitutional, the Ninth Circuit found that case distinguishable from the high school graduation ceremony context because it dealt with after-school activities at which attendance was truly voluntary. *Id.* (citing *Good News Club* at 115-16); App. A11. For those reasons, the court found that Petitioner's case was more appropriately governed by this Court's reasoning in *Lee* than in *Good News Club*. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE NINTH CIRCUIT'S HOLDING FORCES STATE EDUCATION AGENCIES IN THE NINTH CIRCUIT TO CHOOSE BETWEEN VIOLATING THE ESTABLISHMENT CLAUSE OR LOSING FEDERAL

FUNDING PURSUANT TO THE NO CHILD LEFT BEHIND ACT.

As amended by the No Child Left Behind Act of 2001,[1] the Elementary and Secondary Education Act of 1965 requires the Secretary of the Department of Education to issue guidance on constitutionally protected prayer in public elementary and secondary schools. 20 U.S.C. § 7904(a). The federal statute requires this guidance to be reviewed by the Office of Legal Counsel of the Department of Justice, which is to verify that it represents the current state of the law on this issue. *Id.*

As a condition of receiving federal funds under the Act, each local educational agency is required to certify in writing to the appropriate State educational agency that its schools have no policy that prevents or denies participation in constitutionally protected prayer, as detailed in the guidance issued by the Department of Education. 20 U.S.C. § 7904(b). The statute authorizes and directs the Secretary to enforce its provisions. 20 U.S.C. § 7904(c). The Secretary may withhold federal funds from recipients that are not in compliance with the law pursuant to 20 U.S.C. §§1234c and 1234d. *See also Guidance* (App. J3).

On February 7th of this year, the Department of Education issued its "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools" pursuant to the federal statute. (App. J). This document states, in pertinent part:

> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. *Where students or other private graduation speakers are*

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[1] P. L. 107-110 [H.R. 1], January 8, 2002.

> *selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligous) is the speaker's and not the school's.*

Guidance (App. J10) (emphasis added).

Thus, the Ninth Circuit's holding in *Lassonde* places public school officials squarely between the proverbial rock and a hard place. There is simply no way to reconcile the Department of Education's guidelines with the Ninth Circuit's holding, which requires school officials to censor religious content in student speakers' graduation addresses even where the speakers have been chosen on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their speeches. The result of this disparity between the Ninth Circuit's holding and the Department of Education's requirements is that local educational agencies that maintain policies of censorship in compliance with the Ninth Circuit's holding cannot certify in good faith that they have no policy that prevents or denies participation in constitutionally protected prayer as detailed in the Department of Education's guidelines. The Secretary of the Department of Education is therefore authorized and directed to withhold federal funds from school districts that comply with the Ninth Circuit's ruling.

Petitioner respectfully submits that this is an intolerable state of affairs for state and local school officials in the nine states that

comprise the Ninth Circuit and requests that this Court grant the Petition to alleviate this hardship by rendering a decision that reconciles the divergent policies and constitutional interpretations of the executive and judicial branches of government.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO THE CONDITIONS, IF ANY, UNDER WHICH THE ESTABLISHMENT CLAUSE JUSTIFIES OR COMPELS CENSORSHIP OF A STUDENT'S RELIGIOUS EXPRESSION AT A PUBLIC HIGH SCHOOL GRADUATION CEREMONY.

The Supreme Court's decision in *Lee v. Weisman* more than a decade ago left unanswered the question of how the apparent tension among the Free Speech, Free Exercise and Establishment Clauses is to be resolved in situations in which prayer or religious speech occurs at a public high school graduation ceremony under school policies that are substantially different from that considered in *Lee*. In addition to the Ninth Circuit, the Third, Fifth and Eleventh Circuits have considered the general question at various times and through the lenses of varying school policies. *Compare American Civil Liberties Union v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471 (3rd Cir. 1996); *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992); and *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001). Their holdings indicate that a state of conflict and confusion exists among the Circuits concerning whether and under what conditions school officials can or must censor religious speech at public high school graduation ceremonies.

Although these Circuit Courts have reached inconsistent conclusions on the matter, each has premised its holding on *Lee v. Weisman*, the Court's only decision that actually addresses

religious expression at public school graduation programs.[2] The Court found an Establishment Clause violation in *Lee* because the State's involvement in directing and controlling the graduation prayer, a formal "religious exercise," was pronounced. In holding that the prayer policy was unconstitutional, the Court emphasized two primary factors: the extent of state control and the perceived coercion of students to participate. 505 U.S. at 586.

The current split among Circuits that have considered similar cases is consistent with the divergence of views among the Justices in the Court's 5-4 *Lee* decision. In a footnote to his concurring opinion (joined by Justices Stevens and O'Connor), Justice Souter foresaw cases such as Petitioner's involving purely private graduation speech when he stated:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

Id. at 630, n. 8 (Souter, J., concurring). Justice Scalia (joined by Chief Justice Rehnquist and Justices White and Thomas), in dissent, dismissed the view that students in attendance were coerced into participating in a religious exercise. *Id.* at 638 (Scalia, J., dissenting).

Santa Fe addressed a policy that allowed members of the senior class to elect whether to include a prayer in the activities

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[2] While the Court could have considered the question in *Santa Fe*, it chose instead to limit its consideration to the question whether the policy permitting prayer at football games violated the Establishment Clause. 530 U.S. at 301.

before home football games. 530 U.S. at 298, n. 5. The Court held that the policy violated the Establishment Clause, even if the prayers were regarded as "nonsectarian" and "non-proselytizing." *Id.* at 301. The Court rejected the school's argument that the policy was one of neutrality toward religion and found instead that it involved "both perceived and actual endorsement of religion." *Id.* at 305.

> The delivery of a [religious] message – over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer – is not properly characterized as "private" speech.

Id. at 310.

Since *Lee*, lower courts have been asked on numerous occasions to resolve constitutional challenges raised when students or school officials sought to inject religious content into public high school graduation ceremonies.[3] However, because *Lee* involved a

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[3] *See Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) ("nonsectarian" prayer based on senior class election upheld after *Lee*); *Gearon v. Loudoun County Sch. Bd.*, 844 F.Supp. 1097 (E.Dist. Va. 1993) (prayer based on senior class election struck down after *Lee*); *Harris v. Joint Sch. Dist. No. 241*, 821 F.Supp. 638 (D. Idaho 1993), *vacated as moot at* 62 F.3d 1233 (9th Cir. 1995) (prayer based on senior class election upheld after *Lee*); *ACLU v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471 (3rd Cir. 1996) (prayer based on senior class election struck down after *Lee*); *Doe v. Madison Sch. Dist. No. 321*, 7 F.Supp.2d 1110 (D. Idaho 1997), *vacated for lack of standing at* 177 F.3d 789 (9th Cir. 1999) (policy allowing graduation address of speaker's

prayer that was tainted by such extensive governmental involvement, it has provided little guidance for lower courts that must address policies involving student speakers and less pronounced State action. As the conflicting decisions in *Adler* and *Lassonde* indicate, *Santa Fe* has not fulfilled the lower courts' need for direction in such contexts. Even assuming that *Santa Fe* is applicable at all to policies concerning religious speech as opposed to prayer, *Santa Fe* provides little guidance for lower courts' analysis of policies that do not involve State-initiated elections on the inclusion of religious speech and were not designed specifically for the purpose of facilitating prayer or religious speech.

A. The Fifth and Eleventh Circuits View Religious Speech at Graduation as Permissible Under Certain Circumstances.

Both the Fifth and Eleventh Circuits have upheld policies that permitted students to deliver prayers or religious messages at their graduation ceremonies. In *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001)(*en banc*), the Eleventh Circuit upheld a graduation speech policy that allowed students to vote on

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choice, including prayer, upheld after *Lee*); *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) (policy allowing graduation address of speaker's choice, including prayer, upheld after *Santa Fe*); *Deveney v. County of Kanawha*, 231 F.Supp.2d 438 (S.Dist. W.Va. 2002) (prayer based on senior class election struck down after *Santa Fe*); *Skarin v. Woodbine Comm. Sch. Dist.*, 204 F.Supp.2d 1995 (S.Dist. Iowa 2002) (choral singing of "The Lord's Prayer" constituted impermissible "religious ritual" under *Santa Fe*); *Lassonde*, 167 F.Supp.2d 1108 (N. Dist. Ca. 2001), *aff'd*, 320 F.3d 979 (9th Cir. 2003) (policy of removing "sectarian" and "proselytizing" content from student graduation speaker's address required by *Santa Fe*).

whether to include a "student message" in the graduation ceremony, to be delivered by a student volunteer who would also be elected by the class. Like the policy at issue in Petitioner's case, the *Adler* policy contained no explicit reference to prayer. The case had been vacated by the Supreme Court and remanded for reconsideration in light of its recent decision in *Santa Fe*, 531 U.S. 801 (2000), but the Eleventh Circuit, sitting *en banc*, found that the *Santa Fe* holding did not change its conclusion that the policy did not violate the Establishment Clause. 250 F.3d at 1332.

The *Adler* court first reviewed its initial analysis of the case, which was guided by the principles outlined by the Supreme Court in *Lee*. The Eleventh Circuit had distinguished the policy in *Adler* from that in *Lee* because under the *Adler* policy, officials had no power to direct that a religious message be delivered or to control the content of student messages. *Id.* at 1332-33. The court explicitly rejected the argument that the State's role in controlling the graduation ceremony itself transformed private speech into state-sponsored speech. *Id.* at 1333. Likewise, the court rejected the argument that attendees would be coerced to participate in religious messages, reasoning that school officials' failure to censor a private message simply did not amount to official endorsement of the message. *Id.* at 1333.

The absence of two factors crucial to this Court's decision in *Santa Fe* led the Eleventh Circuit to conclude that the school's policy was constitutional. *Id.* at 1336. First, the policy in *Santa Fe* confined the content and topic of the student's speech in such a way that it was practically inevitable that a religious message would be the result. *Id.* (quoting *Santa Fe*, at 303). Second, the *Santa Fe* policy, by its terms, invited and encouraged religious messages. *Id.* (quoting *Santa Fe*, at 306).

Juxtaposing the policy in *Adler* with the one struck down in

Santa Fe, the Eleventh Circuit concluded that no reasonable person attending the graduation ceremony could view the unregulated student message as imposed by the State because the student who was elected to deliver it remained free to decide what to say. *Id.* at 1337. The court noted that the Supreme Court had not ruled in *Santa Fe* that all speech authorized by a government policy and occurring on government property at a government-sponsored, school-related event is automatically state-sponsored speech. *Id.* at 1341. Rather, the Supreme Court had expressly stated that "not every message delivered under such circumstances is the government's own." *Id.* (quoting *Santa Fe*, at 302). In the Eleventh Circuit's view, the crucial factor to the Supreme Court's *Santa Fe* decision was the fact that the *Santa Fe* policy expressed school officials' clear preference for religious messages. *Id.* at 1338. *Cf. Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000), *cert. den.*, 533 U.S. 916 (2001) ("Private speech endorsing religion.... is not the school's speech even though it may occur in the school. Such speech is not unconstitutionally coercive even though it may occur before non-believer students.").

In *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *reh'g en banc denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), ("*Jones v. Clear Creek II*"), the Fifth Circuit reconsidered an earlier decision in which it upheld a policy that allowed the senior class to determine whether an invocation and/or benediction should be included in their graduation ceremony. The Fifth Circuit's initial ruling was vacated and remanded by the Supreme Court, 505 U.S. 1215 (1992), which ordered the Circuit Court to reconsider the decision in light of the recently-announced *Lee* opinion. 977 F.2d at 965.

The Fifth Circuit held that *Lee* did not alter its earlier decision that the school's invocation policy was constitutional. *Id.* The court noted that in *Lee* the Supreme Court did not apply the traditional

test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) for determining whether a government policy violates the Establishment Clause but rather relied on an "endorsement" and "coercion" analysis. *Id.* However, because the Supreme Court had not officially overruled *Lemon*, the Fifth Circuit proceeded to apply the *Lemon* test a second time in addition to the endorsement and coercion analysis applied in *Lee*. *Id.*

First applying *Lemon*, the court held that nothing in *Lee* abrogated its earlier conclusion that the policy had both a secular purpose and primary effect of solemnizing the event. *Id.* The court also found that *Lee* had not altered its reading of the entanglement prong as limiting only institutional entanglement. *Id.* at 968. While institutional entanglement was present in *Lee* because a rabbi chosen by the school wrote and delivered the prayer, the *Clear Creek* policy did not involve unconstitutional entanglement. *Id.*

The court then moved on to the endorsement and coercion analysis. According to the Fifth Circuit, unconstitutional endorsement occurs when a reasonable person would view the government action in question as disapproval of contrary religious choices. *Id.* The court found that, with respect to endorsement, the *Clear Creek* policy was more like the policy upheld by the Supreme Court in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) than the one struck down in *Lee*. While in *Lee* school officials had arranged for the prayer to occur and directed the clergyman to deliver it, school officials assumed a passive role in *Clear Creek*, simply allowing students the choice whether to pray. This was consistent with the Court's holding in *Mergens* that school officials do not violate the Establishment Clause by passively allowing a Christian club to meet on school grounds on a nondiscriminatory basis. *Id.* at 968-69. In this context, reasoned the court, a graduating student who had participated in the decision whether to include prayer in the

ceremony would understand that any religious references were the result of student choice rather than government choice. *Id.* at 969.

Finally, the Fifth Circuit found that the policy in *Clear Creek* did not present the same coercion concerns as those implicated by the policy in *Lee* because school officials' role in bringing about any prayer that might occur was much less pervasive under the *Clear Creek* policy. *Id.* at 970-71. Under the *Clear Creek* policy, school officials did not solicit or direct prayers. *Id.* Students would feel far less pressure to participate in the prayer, reasoned the court, because they would know the prayer was attributable to their peers rather than to a school official or other authority figure. *Id.*

Jones v. Clear Creek II has been cited by at least one Fifth Circuit court after *Santa Fe,*[4] and there is no indication that the Court of Appeals regards the case as lacking authority in view of *Santa Fe.*

B. The Third and Ninth Circuits Hold Religious Speech at Graduation Impermissible Under Virtually Any Circumstances.

In *ACLU v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3rd Cir. 1996) (*en banc*), the full Third Circuit struck down a policy that employed an election mechanism to allow senior students to vote on the inclusion of a prayer, moment of reflection or nothing at all in the ceremony. 84 F.3d at 1475. The policy also allowed the students to decide how they would determine what form of prayer, if any, would be delivered. *Id.* Finally, the policy mandated that a disclaimer be printed in the programs for the graduation ceremony, explaining that any

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[4] *See Jabr v. Rapides Parish Sch. Bd.*, 171 F.Supp.2d 653, 659, 661 (W.Dist. La. 2001).

presentations made at the ceremony did not reflect the views of school officials or other students. *Id.*

The Third Circuit ruled that any graduation prayer delivered pursuant to this policy would bear the State's imprint, even though the State's involvement was less pronounced than in *Lee*. *Id.* at 1479. This was so, the court reasoned, because the ceremony was a school-sponsored event that was organized by school officials, held on school property and funded by the school. *Id.* Furthermore, the court found that the coercion concern discussed in *Lee* applied with equal force under this policy because dissenters would be required to participate in or respect student-led worship. *Id.* at 1480.

The election mechanism, explained the court, did not remove the school's imprint from the graduation speaker's expression but would rather bolster a non-adherent's conclusion that his or her religious choices were disfavored in the school community. *Id.* at 1487. In striking the policy, the court emphasized that the text of the policy itself indicated that it was enacted in response to the *Lee* decision and that school officials' avowed purpose in enacting the policy was to allow the tradition of graduation prayer to continue. *Id.* at 1479-80.

The Ninth Circuit, while applying *Lee* in a similar fashion to the Third Circuit, went much further in Petitioner's case by holding that public high school officials are *required* by the Establishment Clause to censor students' graduation speeches of sectarian, proselytizing religious references, even where the religious speech was not directed or even encouraged by school officials and where school officials were completely divorced from the decision to inject religious content into the graduation ceremony. 320 F.3d at 985 ("There is no room in *Cole* for a public school to disclaim sectarian, proselytizing religious speech at a graduation ceremony."). Thus,

the Ninth Circuit would apparently consider a policy such as the one upheld by the Eleventh Circuit in *Adler* to be unconstitutional. The Ninth Circuit has completely foreclosed the possibility that school officials could distance themselves from students' religious expression to avoid an Establishment Clause violation.

Petitioner respectfully requests that in view of the clear split of authority discussed above, review by this Court is warranted to clarify whether there are conditions under which the Establishment Clause justifies or compels censorship of a student speaker's religious speech at a public high school graduation ceremony.

III. THE COURT SHOULD GRANT REVIEW TO ADDRESS THE NINTH CIRCUIT'S DRAMATIC AND UNWARRANTED EXTENSION OF THIS COURT'S HOLDINGS IN *LEE* AND *SANTA FE* AND ITS DEPARTURE FROM ESTABLISHED FIRST AMENDMENT JURISPRUDENCE.

Petitioner respectfully submits that the Ninth Circuit's holding in this case represents a dramatic, unwarranted extension of this Court's holdings in *Lee* and *Santa Fe,* as well as a departure from the Court's First Amendment jurisprudence generally. First, a significant broadening of the Court's holdings was necessary for the Ninth Circuit to conclude that the coercion concern first expressed by this Court in *Lee* and again acknowledged in *Santa Fe* applies to pure speech as well as to prayer, which the Court termed "religious exercise." *See Lee*, 505 U.S. at 594 (referring to prayer as "religious exercise"). Second, the Ninth Circuit has expanded those decisions to hold that the Establishment Clause prohibits school officials from allowing a student to deliver a speech including religious content at a public high school graduation ceremony, even where the school policy is to allow students selected based on neutral criteria to choose their own topics and content. Finally, the

Ninth Circuit has departed from this Court's established First Amendment jurisprudence inasmuch as it has required school officials to negate any misperceptions of government endorsement of religious speech by engaging in wholesale censorship of private religious expression, rather than by the less restrictive means of providing a disclaimer to vitiate any appearance of endorsement of the speech.

A. The Ninth Circuit's Application of this Court's "Coercion" Analysis to Pure Speech is a Dramatic and Unwarranted Extension of the Court's Rulings.

In *Lee,* the Court expressed a concern that students attending the graduation ceremony would be subjected to "subtle coercive pressures" to participate in the prayer, which it termed an "overt religious exercise." *Lee*, at 588. This concern stemmed from the Court's acknowledgment that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). However, the Court nowhere suggested that these concerns are implicated by a private individual's pure speech.

A close reading of *Lee* indicates that the Court's coercion concern was based on the fact that the prayer in which students may have felt coerced to participate flowed from State action or involvement. The Court found that "[i]n this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit." *Id.* at 597. Petitioner respectfully suggests that where religious expression is pure speech, rather than an invocation or a benediction, is not of a "state-imposed character"

and is not delivered by a school official or an individual selected by school officials based on religious criteria, Establishment Clause concerns, includir g coercion concerns, are inapposite.

The Ninth Circuit has taken a gigantic analytical leap from *Lee* and *Santa Fe* by holding that "[a]llowing [the student to deliver a speech that includes sectarian religious content] would have compelled a dissenter's implicit participation in the proselytizing." While it is conceivable that a person who maintains a respectful silence along with others during a group prayer might feel that he or she has been subtly coerced into participating in the prayer, it defies logic to assume that one who remains silent while another person addresses an audience via pure speech would reasonably feel that he or she has "participated" in the speech. *Cf. Brown v. Gilmore*, 258 F.3d 265, 281 (4th Cir. 2001), *cert. den.*, 534 U.S. 996 (2001), citing *Santa Fe*, 530 U.S. at 313; *Wallace v. Jaffree*, 472 U.S. 38 at 72 (1985) (O'Connor, J., concurring in the judgment) (a moment of silence lacks the element of coercion; "Establishing a short period of mandatory silence does not ipso facto amount to the establishment of anything but silence."). Under most circumstances, no reasonable person presumes from a listener's respectful silence that he or she even agrees with the speaker's beliefs, much less "participates" in his or her speech. Surely a listener is not bound to get up and walk out to express disagreement with the speaker. Rather, to courteously remain silent while another person is speaking is to exhibit a form of respect for the speaker – not for the views that he or she may be expressing.

Moreover, Petitioner respectfully submits that the entire coercion analysis is inapplicable when a student has been chosen to speak on a topic of his or her preference, based on completely neutral criteria and pursuant to a policy that was not promulgated for the purpose of facilitating religious speech. In this context, Petitioner respectfully submits that the Establishment Clause is not

thereby implicated because any speech delivered pursuant to such a policy is private speech. Petitioner respectfully requests that this Court grant review to clarify that the "coercion" analysis does not apply when the religious speech is pure, private speech rather than a government-directed formal religious exercise.

B. The Ninth Circuit's Holding that the Establishment Clause Requires School Officials to Censor Religious Content from a Student's Graduation Speech, Even Where the School's Policy is Otherwise Neutral, is a Dramatic and Unwarranted Extension of this Court's Rulings.

This Court has not held that the Establishment Clause requires public high school officials to affirmatively prohibit student speakers from including religious content in their graduation speeches. The policy addressed in *Lee* did not even involve student speakers, but rather, allowed school officials to determine that prayers should be included in the ceremony and to choose and invite local clergymen to deliver them. *Lee*, at 581. Because the very applicability of the Establishment Clause turns on a finding that religious speech is the government's own speech, it is puzzling that some courts, including the Ninth Circuit, have been quick to extend *Lee* to hold that the Establishment Clause prohibits religious speech at graduation ceremonies when the speech proceeds from a student's own mouth and is not directed by school officials. *See Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (school "sponsorship" of student speech is not to be lightly presumed); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3rd Cir. 2001) (same).

While *Santa Fe* did (at least ostensibly) involve student speakers, the Court's holding was premised on the fact that these students effectively functioned as puppets controlled by school

officials who desired to incorporate prayer into the activities preceding the school's football games. As the Court stated,

> Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."

Santa Fe, 530 U.S. at 305 (quoting *Lee*, at 590). The policy, by its terms, invited and encouraged religious messages. *Id.* at 306. Moreover, the history behind the policy revealed that its purpose was to preserve the practice of prayer before football games. *Id.* at 309.

Nothing in *Lee* or *Santa Fe* suggests that the Court interprets the Establishment Clause to require school officials to affirmatively prohibit private student speakers from including religious content in their graduation speeches. Rather, the principle of non-establishment is respected, not offended, by government policies of neutrality toward religious and secular speech. *See generally Widmar v. Vincent*, 454 U.S. 263 (1981) (declaring unconstitutional a university's policy of excluding religious groups from access to university buildings); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (permitting religious club to meet on school premises on same terms as secular clubs would not violate Establishment Clause); *Board of Educ. v. Mergens*, 496 U.S. 226 (upholding federal Equal Access Act against Establishment Clause challenge). This Court has held, in no uncertain terms, that school officials may not impose restrictions on religious speech that are not imposed on secular speech. *See Mergens, supra; Lamb's Chapel*

v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); *Good News Club, supra.*

C. The Ninth Circuit Has Radically Departed from the Supreme Court's First Amendment Jurisprudence by Failing to Require School Officials to Resolve Endorsement Concerns by an Available Means Less Restrictive than Total Censorship.

This Court has held that content-based speech restrictions may only be upheld if they are narrowly tailored to promote a compelling government interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). If a less restrictive means of achieving that compelling interest is available, government officials must employ that means, rather than engaging in censorship. *Id.* (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

In *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995), the Court discussed the efficacy of private or government disclaimers to save religious expression from the appearance of being endorsed by the government:

> If [the State] is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such. That would be a content-neutral "manner" restriction that is assuredly constitutional. But the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.

Pinette, 515 U.S. at 769 (internal citations omitted).

In *Mergens*, Justice O'Connor, writing for the Court, observed:

> [P]etitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students. To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

496 U.S. at 251 (citation omitted). Likewise, Justices Brennan and Marshall, concurring, stated:

> Westside must take steps to fully disassociate itself from the Christian club's religious speech and avoid appearing to sponsor or endorse the club's goals. It could, for example, entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. Or, if Westside sought to continue its general endorsement of those clubs that did not engage in controversial speech, it could do so if it also affirmatively disclaimed endorsement of the Christian club.

496 U.S. at 270. *See also Lynch v. Donnelly*, 465 U.S. 668, 706-07 (1984) (Brennan, J., dissenting) ("the city has done nothing to disclaim government approval of the religious significance of the creche"), citing with approval *Allen v. Morton*, 495 F.2d 65, 67-68 (D.C. Cir. 1973) (*per curiam*) (inclusion of a creche as part of a national "Pageant of Peace" on federal property on condition that "explanatory plaques" would disclaim any sponsorship of religious beliefs); *County of Allegheny v. ACLU*, 492 U.S. 573, 619 (1989) ("While no sign can disclaim an overwhelming message of endorsement... an 'explanatory plaque' may confirm that in

particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs.").

Faced with a choice between censoring religious content from a student's graduation speech and disclaiming endorsement of the speech, it seems obvious that the latter is the less restrictive means of furthering the government's interest in avoiding the appearance of endorsement. This would make explicit what should already be implicitly understood by those in attendance. The Court's statement in *Santa Fe* that the school district had failed to disassociate itself from the religious content in the invocations by implementing a student voting process implies that there must be alternative means of disassociation that would prove satisfactory to the Court. *Santa Fe*, at 305.

Petitioner respectfully requests that this Court grant his petition to correct the Ninth Circuit's holding that a student's choice to include religious content in a graduation speech that he has earned the right to deliver violates the Establishment Clause and must be censored by school officials. This holding is antithetical to the First Amendment.

CONCLUSION

The Ninth Circuit has held that the Establishment Clause requires public high school officials to censor religious content from graduation speeches composed by students who are chosen based on neutral criteria pursuant to a policy that was not designed to facilitate prayer or religious expression. This holding is in opposition to the federal Department of Education's position and the view of at least two other Circuits and represents a dramatic and unwarranted extension of this Court's rulings in *Lee* and *Santa Fe*. The ruling ignores this Court's mandate that government officials

employ the least restrictive means of avoiding an appearance of endorsement of religion. The decision also stands for the startling proposition that when individuals are exposed to purely private speech involving a religious viewpoint at a public gathering, they have been coerced to participate in a formal "religious exercise." Petitioner submits that such an illogical conclusion cannot be left in place to undermine precious constitutional freedoms.

For these reasons, Petitioner prays that the Court grant certiorari to review the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

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May 20, 2003

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No. 01-17226

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

320 F.3d 979

January 17, 2003, Argued and Submitted, San Francisco, California

February 19, 2003, Filed

Before: Procter Hug, Jr., Arthur L. Alarcon, and Susan P. Graber, Circuit Judges.

GRABER, Circuit Judge:

Plaintiff Nicholas Lassonde brings this action under 42 U.S.C. § 1983, alleging that school officials violated his First Amendment rights by censoring sectarian, proselytizing portions of a speech that Plaintiff gave at his high school graduation ceremony. The district court granted summary judgment in favor of Defendants, concluding that the school officials' acts were necessary to avoid violating the Establishment Clause. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Because of his sterling grade-point average of 4.24, Plaintiff was one of two co-salutatorians of the Amador Valley High School class of 1999. As a result of his academic standing, he was invited to deliver a speech at the school's graduation ceremony that year. Plaintiff, who is a devout Christian, drafted a speech that quoted extensively from the Bible. In his declaration, Plaintiff explained that he intended for the speech to "express[] [his] desire for [his] fellow graduates to develop a personal relationship with God through faith in Christ in order to better their lives."

Principal Coupe, who maintained control over all aspects of the graduation ceremony, asked Plaintiff to submit a draft of his speech. Plaintiff did so. Coupe reviewed the draft and, in conjunction with the school district's counsel, determined that allowing a student to deliver overtly proselytizing comments at a public high school's graduation ceremony would violate the Establishment Clauses of both the United States and the California Constitutions. Accordingly, Coupe and the district's counsel advised Plaintiff that references to God as they related to Plaintiff's own beliefs were permissible, but that proselytizing comments were not.

For example, Plaintiff intended to discuss the general moral decay of American society during the past 30 years and to encourage his fellow students to turn to God and Jesus for strength. The three portions of his speech that the school told him to remove were:

> I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of "modern society".

> As Psalm 146 says, "Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea, and everything in them--the Lord, who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the Lord loves the righteous. The Lord watches over the alien and sustains the fatherless and the widow, but he frustrates the ways of the wicked."
>
> * * * *
>
> "For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." Have you accepted the gift, or will you pay the ultimate price?

Although Defendants demanded that Plaintiff excise those portions, they allowed him to retain several personal references to his religion. For example, Plaintiff's speech began with a dedication to the memory of his grandfather, who had planned to attend the graduation but who, just that past week, had gone "home to be with the Lord." Plaintiff's speech closed with the words, "Good Luck and God Bless!"

Before Plaintiff agreed to excise the proselytizing portions of the graduation speech, the parties engaged in discussions to determine what Plaintiff would and would not be allowed to say. Plaintiff's counsel suggested that the school district provide a "disclaimer" that would state that the views of the student speakers did not represent the views of the school

district. This suggestion was rejected. The parties eventually reached a compromise. Under protest, Plaintiff agreed that he would deliver his speech without the proselytizing passages and would hand out copies of the full text of his proposed draft speech just outside the site where the graduation ceremony would be held.

On June 18, 1999, Amador Valley High School held its graduation ceremony. The ceremony took place at the Alameda County Fairgrounds, but it was financed and insured entirely by the school district and was conducted entirely under the school's direction. Plaintiff delivered his speech at the ceremony and distributed handouts as agreed. When he reached the portions of the speech that had been excised, he informed his fellow students that portions had been censored. He told the audience that he would distribute copies of the uncensored speech outside the graduation ceremony and that he would give the full speech on Sunday at his church.

Nearly one year later, Plaintiff filed this action seeking damages from the school district; Mary Frances Callan, the school district's superintendent; Jim Negri, assistant superintendent; and Bill Coupe, the principal. Plaintiff asserted seven claims against Defendants: violation of Plaintiff's federal constitutional rights to free speech, religious liberty, and equal protection; violation of Plaintiff's state constitutional rights to free speech, religious liberty, and equal protection; and violation of a state education statute. Defendants answered that their actions were protected by qualified immunity.

Both parties moved for summary judgment. After dismissing claims against the school district and the school officials in their individual capacities under the Eleventh Amendment, the district court granted summary judgment in favor of the remaining Defendants in their official capacities.

Relying on this court's decision in *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), the district court concluded that Defendants' actions were necessary to avoid violating the Establishment Clause. The court rejected Plaintiff's equal protection argument and declined to exercise supple-mental jurisdiction over Plaintiff's state-law claim.

Plaintiff filed a timely notice of appeal. His appeal is limited to the question whether, under the first step of the qualified immunity analysis required by *Saucier v. Katz*, 533 U.S. 194, 200, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001), Plaintiff has alleged facts amounting to a federal constitutional violation. Specifically, the questions posed are whether the restriction on Plaintiff's speech violated the First Amendment and whether the school's rejection of Plaintiff's suggested disclaimer as a "less restrictive" alternative to censoring Plaintiff's speech violated the First Amendment.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment. *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055 (9th Cir. 2002). Summary judgment is appropriate if, drawing all inferences in favor of the nonmoving party, there are no genuine issues of material fact. *Id.*

DISCUSSION

Under *Saucier*, 533 U.S. at 200, we must conduct a two-step inquiry in order to determine whether Defendants are entitled to qualified immunity. First, we must decide whether Plaintiff has asserted facts that amount to a violation of his federal constitutional rights. *Id.* If so, we must decide whether the law surrounding that constitutional violation was "clearly established" when Defendants acted. *Id.*

At the first step, Plaintiff has not alleged facts amounting to a constitutional violation. That being so, we need not reach the second step of the *Saucier* analysis.

Under our precedent in *Cole*, Defendants' actions were necessary to avoid a conflict with the Establishment Clause. 228 F.3d at 1101. The Supreme Court's opinion in *Good News Club v. Milford Central School*, 533 U.S. 98, 150 L. Ed. 2d 151, 121 S. Ct. 2093 (2001), which was decided after *Cole*, does not require a different result.

A. Cole *controls*.

Our decision in *Cole* squarely controls Plaintiff's case. The facts are almost identical. n1 The student speakers in *Cole*, one of whom was a co-valedictorian, sought to give similar proselytizing speeches at their graduation ceremony. *Cole*, 228 F.3d at 1096. As was its policy, the school district reviewed the speeches before the graduation ceremony took place. *Id.* The school district required that the students in *Cole* "tone down the proselytizing and sectarian religious references." *Id.* The students refused and sued for damages.

----------Footnotes----------

n1 There are a few minor differences, but none is material. For example, Plaintiff here gave his speech with Defendants' redactions, while the plaintiff in *Cole* refused to deliver a speech at all. However, the difference in the plaintiffs' reactions to the censorship is not relevant to the question whether the censorship itself violated their constitutional rights.

----------End Footnotes----------

Applying a two-part qualified immunity analysis that is consistent with *Saucier,* 533 U.S. at 201, we concluded in *Cole* that we need not go beyond the first step:

> We conclude the District officials did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech . . . as part of the graduation was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000), and *Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992). *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 837, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995)(analyzing whether a university's viewpoint discrimination was excused by the necessity of complying with the Establishment Clause); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.") . . . .

228 F.3d at 1101.

Cole held that the school district's actions were necessary for two related, but subtly distinct, reasons. First, the school district had to censor the speech in order to avoid the appearance of government sponsorship of religion. *Id.* at 1101; *see also Santa Fe*, 530 U.S. at 305-10. Second, allowing the speech would have had an impermissibly coercive effect on dissenters, requiring them to participate in a religious practice

even by their silence. *Cole*, 228 F.3d at 1104; *see also Lee*, 505 U.S. at 593.

As for the sponsorship concern, in *Cole* we determined that the school district's "plenary control over the graduation ceremony, especially student speech, makes it apparent [that the sectarian] speech would have borne the imprint of the District." 228 F.3d at 1103. The school district authorized the valedictory speech in *Cole* as part of the graduation program, the graduation program was financed by the district, and the principal had supervisory control over the graduation and had the final authority to approve the content of student speeches. *Id.*

In Plaintiff's case, the school district exercised the same "plenary control" over the graduation ceremony. Speakers were selected by the school solely because of their academic achievement; that is, the school endorsed and sponsored the speakers as representative examples of the success of the school's own educational mission. The principal reviewed and approved the speeches beforehand. The facilities, although not owned by the school district as in *Cole*, were rented and insured by the district for the ceremony and were, during the ceremony, operated completely by the school.

As further support for our decision in *Cole*, we held that allowing the sectarian speech "would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice." *Id.* at 1104. "Allowing [the] speech at graduation would have compelled a dissenter's implicit participation in the proselytizing." *Id.* Relying on the Supreme Court's opinion in *Lee*, we explained that the relevant inquiry is "whether 'a reasonable dissenter . . . *could* believe that the group exercise

signified her own participation or approval of it.' " *Id.* at 1104 (quoting *Lee*, 505 U.S. at 593) (emphasis in *Cole*).

Reviewing the excised portions of Plaintiff's speech, there is no question that a reasonable dissenter could have felt that silence signified approval or participation. Even if the school district could have conducted the proceedings so as to avoid the appearance of governmental "entanglement" with Plaintiff's speech, it had *no* means of preventing the coerced participation of dissenters attending their graduation ceremony other than censoring Plaintiff's speech. As *Lee* describes it, "high school graduation is one of life's most significant occasions." *Lee*, 505 U.S. at 595. Forcing a dissenter to make the choice between attending such an event and participating in a religious practice with which the dissenter does not agree is not constitutionally permissible. *Id.* at 595-96.

Plaintiff attempts to distinguish *Cole* by arguing that the school district should have allowed him a "less restrictive" alternative to complete censorship. Because *Cole* did not explicitly consider whether a disclaimer could distance a public school far enough from proselytizing speech, Plaintiff argues, it does not control. This argument is unpersuasive for three reasons.

First, Cole implicitly foreclosed the argument. *Cole* held that the school's restriction was "necessary" to avoid running afoul of the Establishment Clause. 228 F.3d at 1101. We did not hold that, in censoring the speech, the school had done more than what was required; rather, we held that the steps taken were "necessary." In other words, if the school had not censored the speech, the result would have been a violation of the Establishment Clause.

Second, *Cole*'s implicit holding is correct. Even if a disclaimer were given, and even if it could dissolve governmental "entanglement" sufficiently, a disclaimer could not address the other ground underlying both *Cole* and *Lee*: permitting a proselytizing speech at a public school's graduation ceremony would amount to coerced participation in a religious practice. Regardless of any offered disclaimer, a reason-able dissenter still could feel that there is no choice but to participate in the proselytizing in order to attend high school graduation. Although a disclaimer arguably distances school officials from "sponsoring" the speech, it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way.

Third and finally, even if Defendants were obliged to provide a "less restrictive" alternative to absolute censorship, they did. Defendants permitted Plaintiff to distribute copies of the complete draft just outside the graduation venue, and he did.

In summary, Plaintiff's case is indistinguishable from *Cole*. *Cole* controls unless some later Supreme Court or en banc authority undermines its logic. n2

----------Footnotes----------

n2 There are no relevant en banc cases that affect the holding in *Cole*.

----------End Footnotes----------

B. *The Supreme Court's decision in* Good News Club *does not detract from* Cole.

Plaintiff argues that *Cole* no longer is good law after the Supreme Court's decision in *Good News Club*. We disagree.

In *Good News Club*, the Supreme Court held that a New York school district's regulation that allowed after-hours access to school facilities for all comers except those espousing a religious message constituted impermissible viewpoint discrimination. 533 U.S. at 110. The Court concluded that the district's interest in avoiding a violation of the Establishment Clause was not compelling enough to justify discrimination on the basis of the speaker's viewpoint. *533 U.S.* at 113.

The decision in *Good News Club* hinged on the fact that "the school had no valid Establishment Clause interest" in precluding religious speech in that context. *533 U.S.* at 113. The censored religious activities took place outside school hours, and participation was purely voluntary. *Id.* at 115-16. The Court carefully distinguished its decision in *Lee*, recognizing that *Lee* had "concluded that attendance at the graduation exercise was obligatory." *Id.* at 115. "Here, where the school facilities are being used for a nonschool function and there is no government sponsorship of the Club's activities, *Lee* is inapposite." *Id.* at 116.

The setting of Plaintiff's case is the same as that in *Lee*. The graduation ceremony was a school-sponsored function that all graduating seniors could be expected to attend. Unlike in *Good News Club*, where circumstances made the "consideration of coercive pressure and perceptions of endorsement" essentially irrelevant, 533 U.S. at 120-21 (Scalia, J., concurring) (citation omitted), here those issues are in the forefront. *See also Prince v. Jacoby*, 303 F.3d 1074, 1095 (9th Cir. 2002) (Hall, J., concurring) (distinguishing graduation ceremonies from club meetings at which attendance is voluntary).

In short, the two situations are materially different. The after-hours meetings in *Good News Club* lacked the imprimatur of the school, whereas the essence of graduation is to place the

school's imprimatur on the ceremony-- including the student speakers that the school selected. *Good News Club* involved only the voluntary participation of some students, with prior parental permission, whereas the essence of high school graduation is the participation of all, as a captive audience. *Good News Club* does not change the result that *Cole* demands.

CONCLUSION

Cole controls. *Good News Club* did not undermine *Cole*. There is no room in *Cole* for a public school to disclaim sectarian, proselytizing religious speech at a graduation ceremony.

AFFIRMED.

B1

NICHOLAS LASSONDE, Plaintiff, v. PLEASANTON UNIFIED SCHOOL DISTRICT, et al., Defendants.

NO. C00-2150 TEH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

167 F. Supp. 2d 1108

September 28, 2001, Decided

October 2, 2001, Filed, Entered in Civil Docket

HON. THELTON E. HENDERSON

ORDER

[*1109] This matter came before the Court on Monday, September 24, 2001, on cross-motions for summary judgment or, in the alternative, for summary adjudication under Rule 56 of the Federal Rules of Civil Procedure. After careful consideration of the parties' written and oral arguments, this Court DENIES Plaintiff's motion and GRANTS Defendants' motion for the reasons described below. Plaintiff's state law claims are dismissed without prejudice.

FACTUAL BACKGROUND

Plaintiff Nicholas Lassonde alleges that Defendants violated his constitutional and other rights when they prohibited him from giving a salutatorian speech that included proselytizing comments n1 at his

high school graduation. The undisputed facts are as follows: Based on his grade-point average, Plaintiff was one of two co-salutatorians of the Amador Valley High School class of 1999. As a result, he was invited to deliver a speech at the school's graduation ceremony that year.

----------Footnotes----------

n1 For example, Plaintiff proposed to say the following in his speech: "I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of 'modern society.'" N. Lassonde Decl. Ex. A. He also proposed to quote from Psalm 146, and he wished to conclude by asking his audience, "'For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord.' Have you accepted the gift, or will you pay the ultimate price?" Id.

----------End Footnotes----------

Prior to the ceremony, Plaintiff presented a draft of his speech to Defendant Bill Coupe, principal of Amador Valley High School, following Coupe's request. Coupe reviewed Plaintiff's speech and, in conjunction with the school district's counsel, determined that allowing a student to deliver proselytizing comments at a public high school graduation ceremony would violate the Establishment Clauses of both the United States and California Constitutions. As a result, Coupe and the district's counsel [*1110] advised Plaintiff that references to God as they related to Plaintiff's own beliefs were permissible, but that proselytizing comments were not.

Plaintiff and Defendants engaged in multiple discussions to determine what Plaintiff would and would not be allowed to say during his graduation speech. Plaintiff eventually agreed, under protest, to deliver his speech without the proselytizing language, but

to hand out copies of the full text of his proposed speech outside the graduation ceremony site.

On June 18, 1999, Plaintiff delivered his speech at the graduation ceremony and distributed handouts as agreed. The ceremony occurred at the Alameda County Fairgrounds, but it was financed by Amador Valley High School and conducted entirely under the school's direction. Amador Valley High School is part of the Pleasanton Unified School District ("District").

Nearly one year later, on June 16, 2000, Plaintiff filed this suit seeking damages from Coupe; the District; Mary Frances Callan, the District's superintendent; and Jim Negri, the District's assistant superintendent. Plaintiff asserts seven claims against Defendants: violation of Plaintiff's federal constitutional rights to free speech, religious liberty, and equal protection; violation of Plaintiff's state constitutional rights to free speech, religious liberty, and equal protection; and violation of a state education statute that provides, in part, that school districts shall not "sponsor any activity which reflects adversely upon persons because of their... creed," Cal. Educ. Code § 51500 (West 2001).

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (West 2001); *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury

to return a verdict for the nonmoving party. Id. The court may not weigh the evidence and must view the evidence in the light most favorable to the nonmoving party. *Id.* at 255.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Id.* at 322-323. However, on an issue for which its opponent will have the burden of proof at trial, the moving party can prevail merely by "pointing out to the District Court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. If the moving party meets its initial burden, the opposing party must then "set forth specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed. R. Civ. P. 56(e) (West 2001); *Anderson*, 477 U.S. at 250.

DISCUSSION

I. Eleventh Amendment Sovereign Immunity

Although neither party raised the issue of Eleventh Amendment sovereign immunity, this Court must resolve that issue before reaching the merits of the case. *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. [*1111] 1999). Sovereign immunity limits the jurisdiction of the federal courts and may be raised by a court *sua sponte. Id.*

The Eleventh Amendment "bars suits in federal court against a state and its agencies brought by its own citizens and citizens of other states." *Id.* at 1049. It also bars suits for damages brought against state officials in their official capacities. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) ("A suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."). However, it does not bar suits for damages brought against state officials in their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 30-31, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991).

In this case, Plaintiff asserts claims for damages against the District and three District employees, sued in both their individual and official capacities. The Eleventh Amendment requires that Plaintiff's claims be dismissed as to the District and the three employees in their official capacities. n2 *See Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1100 n.4 (9th Cir. 2000), cert. denied, 149 L. Ed. 2d 138, 121 S. Ct. 1228 (2001) (holding that the district court correctly concluded it did not have jurisdiction over damage claims brought under federal law against a California school district and district officials in their official capacities). *See also Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (holding that California school districts are state agencies for purposes of the Eleventh Amendment and are therefore immune from suit in federal court); *O.H. v. Oakland Unified Sch. Dist.*, 2000 U.S. Dist. LEXIS 21725, No. C-99-5123 JCS, 2000 WL 33376299 at *3-4 (N.D. Cal. Apr. 14, 2000) (citing *Belanger*, 963 F.2d at 254; *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1326 (9th Cir. 1991)) (holding that a California school district is immune from suit in federal court, regardless of whether the causes of action are state or federal). Thus, this Court may only

consider Plaintiff's claims against the three District employees in their individual capacities.

----------Footnotes----------

n2 State agencies can waive sovereign immunity, thereby consenting to be sued. *In re Jackson*, 184 F.3d at 1048. However, Defendants in this case have not done so.

----------End Footnotes----------

II. Plaintiff's Federal Constitutional Claims

A. Qualified Immunity

Defendants assert that the three individual defendants are entitled to summary judgment in their favor on the basis of qualified immunity. Qualified immunity requires a two-step analysis. First, a court must consider whether, "taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the [state official's] conduct violated a constitutional right." *Saucier v. Katz*, 150 L. Ed. 2d 272, 121 S. Ct. 2151, 2156 (2001). If no constitutional right would have been violated if the allegations were established, then there is no need to continue the qualified immunity analysis. *Id.* On the other hand, if a constitutional right would have been violated, then the court must determine "whether the right was clearly established." *Id.*

Following the Supreme Court's qualified immunity framework, this Court cannot rule on the qualified immunity question until it first determines whether Defendants would have violated any of Plaintiff's constitutional rights under the facts alleged, viewed in the light most favorable to Plaintiff. Consequently, this Court now addresses each of Plaintiff's federal constitutional claims to

determine if any of them have merit. [*1112]

B. Federal Free Speech and Religious Liberty Claims

Despite Plaintiff's arguments to the contrary, see infra pp. 6-7, the Ninth Circuit squarely addressed Plaintiff's first two claims -- involving federal constitutional rights to free speech and religious liberty -- in *Cole*, 228 F.3d 1092. The *Cole* defendants, officials from Oroville Union High School, barred plaintiff Chris Niemeyer from delivering a proselytizing valedictory speech at the school's 1998 graduation ceremony. n3 *Id.* at 1096. The Ninth Circuit held that, even assuming that the Oroville graduation ceremony was a public or limited public forum, the defendants' actions did not violate Niemeyer's freedom of speech because they were necessary to avoid violating the Establishment Clause. n4 *Id.* at 1101-05. Moreover, the school officials' actions did not violate the students' religious liberties for the same reason. *Id.* at 1104 n.9.

----------Footnotes----------

n3 The defendants similarly barred plaintiff Ferrin Cole from delivering a sectarian invocation at the same ceremony. *Id.*

n4 Plaintiff and Defendants both devoted a significant amount of briefing to whether the Amador Valley High School graduation was a nonpublic or limited public forum. However, because the Ninth Circuit's controlling decision in *Cole* did not depend on the type of forum, this Court need not decide that question.

----------End Footnotes----------

The facts surrounding Niemeyer's and Plaintiff's speeches are remarkably similar. Both students were selected to give speeches at their respective graduation ceremonies by virtue of class

ranking.n5 Both were told that their speeches would have to be reviewed for content by school officials before they could deliver their speeches at graduation. n6 Both sought to give speeches reflecting their religious beliefs and urging others to adopt those beliefs. And both were denied the opportunity to deliver those speeches at graduation ceremonies supervised by public school officials and financed by public school funds.

----------Footnotes----------

n5 Niemeyer was a co-valedictorian, while Plaintiff was a co-salutatorian.

n6 Plaintiff argues that Defendant Coupe has only been principal of Amador Valley High School since 1998, and so Plaintiff's 1999 graduation was the first one in which Coupe exercised any control as principal. Plaintiff suggests that, as a result, Coupe's review of graduation speeches "could not be regarded as a policy or practice at the time of the events giving rise to this lawsuit." Pl.'s Resp. to Defs.' Separate Statement of Uncontroverted Material Facts at 2. However, this distinction is not persuasive. Plaintiff does not dispute Defendants' claim that Coupe has exercised review over graduation speeches for the past three years in which he has been principal, thereby establishing a policy or practice over time. Furthermore, were this Court to accept Plaintiff's position, no school could ever institute a new policy or practice; students affected by the policy in its first year could argue that the policy was invalid because it had not been established over time. This Court finds such reasoning to be nonsensical, and Plaintiff cites no authority to convince it to reach a contrary conclusion.

----------End Footnotes----------

Plaintiff urges this Court to distinguish *Cole* solely on the basis

that *Cole* did not present the opportunity to consider "whether a disclaimer offered a 'less restrictive means' of accomplishing the state's interest."n7 Pl.'s Mot. for Summ. J. [*1113] at 17-18. This Court finds Plaintiff's argument to be without merit. Although the Ninth Circuit's opinion in *Cole* made no specific reference to disclaimers, it concluded that "the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause." *Cole* at 1101 (emphasis added). Thus, the Ninth Circuit implicitly rejected Plaintiff's argument that a disclaimer would have been effective. n8 If, as Plaintiff argues, a school district could avoid a constitutional violation simply by disclaiming endorsement of the contents of students' speeches, then censoring a student's proselytizing speech would not have been "necessary." *See Id.* (applying strict scrutiny in upholding the school district's decision to censor Niemeyer's speech); *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000) (explaining that, to survive strict scrutiny, a speech regulation must be the least restrictive alternative to achieve a compelling government interest).

----------Footnotes----------

n7 At oral argument, Plaintiff's counsel also raised the argument that *Good News Club v. Milford Cent. Sch.*, 150 L. Ed. 2d 151, 121 S. Ct. 2093 (2001), invalidated the Ninth Circuit's reasoning in *Cole*. This Court is not so persuaded because *Good News Club* involved easily distinguishable facts. In *Good News Club*, the Supreme Court found that it was unconstitutional for a school to deny after-school access to a religious group to use school facilities, which the school opened up for use by other organizations, for meetings that were not school-sponsored and which students were not required to attend. In *Cole* and this case, by contrast, the

schools barred students from delivering proselytizing messages at a school-sponsored graduation ceremony that was closed to the public, conducted completely under the school's direction, and involved students and school and district officials as the only participants. The Supreme Court itself noted the distinction between the facts presented in *Good News Club* and a graduation ceremony. *See Good News Club*, 150 L. Ed. 2d 151, 121 S. Ct. 2093 at 2104-05 (distinguishing the case from *Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992), by observing that, unlike the middle-school graduation ceremony at issue in *Lee*, the access sought in Good News Club involved "a nonschool function" with "no government sponsorship" of the religious activities or speech in question) (further distinguishing the two cases by noting the Court's conclusion in *Lee* that "attendance at the graduation exercise was obligatory," in contrast to the voluntary attendance at meetings of the *Good News Club*).

n8 Under slightly different circumstances, the Third Circuit explicitly rejected the use of a disclaimer as effective in preventing an Establishment Clause violation. *See ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (holding that a policy allowing the senior class of a public high school to vote on whether prayer would be included in its graduation ceremony violated the Establishment Clause, despite a provision that the printed graduation programs include a disclaimer of endorsement).

----------End Footnotes----------

As a member court of the Ninth Circuit, this Court is bound to follow *Cole*. n9 Consequently, it must reject Plaintiff's invitation to analyze his case as if no controlling, on-point authority existed. To the contrary, *Cole* requires this Court to rule in favor of Defendants

on Plaintiff's claims involving federal constitutional rights to free speech and religious liberties.

- - - -

Court has applied heightened scrutiny).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -

D. Summary of Plaintiff's Federal Claims

In short, this Court finds in favor of Defendants on all three of Plaintiff's federal claims. Even viewed in the light most favorable to Plaintiff, the facts alleged do not establish that Defendants violated any of Plaintiff's federal constitutional rights. As a result, this Court need not reach the second stage of qualified immunity analysis discussed in *Katz*, 121 S.Ct. at 2156 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.").

III. Plaintiff's State Constitutional and Statutory Claims

Plaintiff further claims that Defendants violated his state constitutional rights to free speech, religious liberty, and equal protection, along with a state education statute that prohibits school sponsorship of "any activity which reflects adversely upon persons because of their . . . creed," Cal. Educ. Code § 51500 (West 2001). These claims present purely state law matters between parties of non-diverse citizenship. Thus, any jurisdiction over these claims in this Court would have to be supplemental under 28 U.S.C. § 1367.

Because no federal claims remain to be resolved in this case, this Court uses its discretion and declines to exercise supplemental jurisdiction over Plaintiff's state law claims. *See* 28 U.S.C. § 1367(c)(3) (West 2001) (allowing a district court to decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction"). Plaintiff's four state law claims are

therefore dismissed without prejudice.

CONCLUSION

For the above reasons, and finding no dispute over material facts, this Court rules as follows:

1. Plaintiff's Motion for Summary Judgment or, in the Alternative, for Summary Adjudication is DENIED.

2. Defendants' Motion for Summary Judgment is GRANTED.

3. Plaintiff's state law claims are dismissed without prejudice.

IT IS SO ORDERED.

DATED 9/28/01

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

C1

United States District Court
Northern District of California

Nicholas Lassonde JUDGMENT IN A CIVIL CASE

v.

Pleasanton Unified School District, et al. CASE NUMBER: C00-2150 TEH

/ / Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/xx/ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's Motion for Summary Judgment or, in the alternative, for Summary Adjudication is DENIED.

Defendants' Motion for Summary Judgment is GRANTED.

Entered in civil docket 10/2/01

Oct. 2, 2001
Date

Richard W. Wieking
Clerk

Rowena Espinosa /s/
(By) Deputy Clerk

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LASSONDE, Plaintiff, *vs.* PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAN, individually and as Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, JIM NEGRI, individually and as Assistant Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, and BILL COUPE, individually and as Principal of AMADOR VALLEY	Case No.: C00-2150 Complaint for Damages and Attorneys' Fees; Demand for Jury Trial (Violation of Civil Rights of Free Speech, Religious Liberty and Equal Protection) [U.S. Const. Amends. 1, XIV; 42 U.S.C. §§ 1983, 1988; Cal. Const. Art. I, §§ 1, 2, 4, 7]

HIGH SCHOOL,

Defendants.

Plaintiff NICHOLAS LASSONDE ("NICHOLAS") hereby alleges as follows:

Introduction

1. NICHOLAS, now an adult, brings this action against a school district and its representatives in Alameda County, California, for damages arising out of violations of free speech, religious freedom, and equal protection civil rights, based on the censorship of religious content in his high school graduation salutatorian speech given on June 18, 1999.

Original Jurisdiction

2. Jurisdiction in this Federal Court is founded on the existence of a federal question pursuant to 28 U.S.C. § 1331 and the deprivation of civil rights pursuant to 28 U.S.C. § 1343(a)(3), (4). The action arises under the fundamental free speech, religious freedom and equal protection civil rights secured by the First and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1983, 1988, as hereinafter more fully appears.

Supplemental Jurisdiction

3. NICHOLAS also invokes supplemental jurisdiction of this Court over their state claims against Defendants for violations of the California Constitution, statutes and common law pursuant to 28 U.S.C. § 1367 as such claims form part of

the same case or controversy.

Venue

4. Venue in this Northern District of California is proper pursuant to 28 U.S.C. § 1391 because all or a substantial part of the events which give rise to the present claims occurred in this judicial district, and more specifically within Alameda County, California.

Intradistrict Assignment

5. This action should be assigned to the San Francisco Division or Oakland Division of this District Court pursuant to Civil L.R. 3-2(c) because all or a substantial part of the events or omissions which give rise to the present claims occurred in Alameda County, California.

Parties

6. Plaintiff NICHOLAS is and at all relevant times herein was a citizen of the United States of America and the State of California, with his principle place of residence in the City of Pleasanton, County of Alameda, California. NICHOLAS graduated from Amador Valley High School ("AVHS") in Pleasanton on June 18, 1999.

7. Defendant PLEASANTON UNIFIED SCHOOL DISTRICT ("PUSD") is and at all relevant times herein was a school district duly organized and existing under the laws of the State of California, and the local governing entity for whom all other Defendants herein were acting when committing the acts herein alleged. AVHS is under the jurisdiction and control of PUSD.

8. Defendant MARY FRANCES CALLAN is and at all relevant times herein was the Superintendent and an employee of PUSD.

9. Defendant JIM NEGRI is and at all relevant times herein was an Assistant Superintendent and an employee of PUSD.

10. Defendant BILL COUPE is and at all relevant times herein was the Principal of AVHS and an employee of PUSD.

11. Plaintiff is informed and believes and thereon alleges that at all relevant times herein Defendants, and each of them, were agents, servants, employees, supervisors, joint venturers and/or co-conspirators of their co-defendants, and in doing the things herein alleged, were acting within the course, scope and authority of said agency, employment, joint venture and/or conspiracy, and each defendant has ratified, authorized and approved the acts of the other.

12. At all relevant times and for all actions herein alleged, all of the Defendants acted toward Plaintiff under color of law, including statutes, ordinances, customs and usages, of the State of California, County of Alameda, and PUSD, pursuant to the official policies of PUSD as enacted and adopted by the governing board under color of its authority, acting under color of his/her authority as such, made expressly, impliedly, or by failure to supervise and train reflecting a deliberate indifference to the constitutional and statutory rights of its inhabitants, including Plaintiff, and Plaintiff sues Defendant PUSD in its official capacity and Defendants CALLAN, NEGRI and COUPE in their official and individual capacities.

Government Tort Claims Act Compliance

13. NICHOLAS has complied with the claim filing requirements of the California Government Tort Claims Act (Cal.Gov.C. § 910 et. seq.) for the state tort claims: on or about December 14, 1999, NICHOLAS submitted his claim to PUSD; PUSD rejected the claim on January 11, 2000, and notified NICHOLAS of its rejection by letter dated January 14, 2000, creating a 6-month time period within which NICHOLAS had to commence an action on his state tort claims [Cal.Gov.C. § 945.6(a)]; NICHOLAS herein timely commences an action.

General Allegations

14. NICHOLAS ascribes to the Christian faith. He has personal convictions that a personal relationship with God and Jesus is the most beneficial relationship an individual can have. Additionally, NICHOLAS believes he is commanded in his faith to give credit and glory to God in all circumstances and to spread the Word of God to others.

15. Based on his grade point average of 4.24, NICHOLAS earned the position of being one of two Salutatorians for his graduating Class of 1999 from AVHS.

16. For many years, AVHS has had the tradition of having its Valedictorian and Salutatorian, chosen solely on the basis of their earned grade point averages, present a speech at the graduation ceremonies.

17. On May 19, 1999, Principal COUPE informed NICHOLAS that he was one of two Salutatorians. In line with the tradition of AVHS, Principal COUPE also then informed NICHOLAS that he could give a speech at the graduation

ceremony.

18. NICHOLAS was given no guidelines on the topic of his speech as long as the topic was not profane. He was also informed that Principal COUPE wanted to review the speech prior to its being given.

19. NICHOLAS wrote his speech which discussed the disasters and horrors of the past thirty years and which exhorted his fellow graduates to work toward a better future. His speech included quotations from the Bible, specifically Psalm 146:3-9 and Romans 6:23, and expressed his desire for his fellow graduates to develop a personal relationship with God and Jesus in order to better their lives. NICHOLAS drafted his speech to be obedient to his religious convictions that command him to give credit and glory to God in all circumstances and to spread the Word of God to others. The full text of the speech is attached hereto as Exhibit A.

20. On June 16, 1999, two days before the graduation, Principal COUPE called NICHOLAS into his office to review his graduation speech. Principal COUPE said that he had to check with their lawyers about the speech given its references to God and Jesus.

21. On June 17, 1999, Principal COUPE, Assistant Superintendent NEGRI and PUSD General Counsel Karen Rezendes censored NICHOLAS' speech based on religious content by informing NICHOLAS that he could not present certain portions of his speech because they constituted "proselytizing" or "preaching." They told NICHOLAS that he had to either change his speech or he could not give it. The censored portions of the speech are shown in bold face on Exhibit A.

22. Several times before the graduation, NICHOLAS and his attorneys asserted to PUSD that their censorship violated the civil rights of NICHOLAS. His attorneys also explained to PSUD that they could avoid any perceived problem by providing a standard disclaimer to clarify that the student speakers at graduation do not represent the views of PSUD. Nevertheless, PSUD held fast to its censorship and rejected the use of a disclaimer.

23. AVHS held its graduation ceremony for the Class of 1999 off campus at the Alameda County Fairgrounds Amphitheater on June 18, 1999. AVHS students were not required to attend the graduation ceremony to graduate or obtain their degree.

24. At the AVHS graduation ceremony on June 18, 1999, the Master of Ceremonies was Principal COUPE. NICHOLAS presented his speech at the graduation ceremony but omitted the portions that Defendants had forbidden him from presenting.

FIRST CAUSE OF ACTION
(Violation of Federal Constitutional Rights of Free Speech - All Defendants)

25. Plaintiff incorporates fully herein by reference the allegations contained in Paragraphs 1 through 24 above.

26. Defendants censored Plaintiff's speech specifically for religious references and prevented him from expressing his personal beliefs and religion, in violation of Plaintiff's rights of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution, for which Defendants, and each of them, are liable. Said actions were made without any compelling state interest, and were not made

with the least restrictive means. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CAUSE OF ACTION
(Violation of Federal Constitutional Rights of Religious Liberty - All Defendants)

27. Plaintiff incorporates fully herein by reference the allegations contained in Paragraphs 1 through 26 above.

28. Defendants prevented Plaintiff from expressing his religious beliefs in his own graduation speech, in violation of Plaintiff's rights of religious liberty as guaranteed by the Free Exercise Clause of the First Amendment to the United States Constitution, for which Defendants, and each of them, are liable. Said actions were made without any compelling state interest, and were not made with the least restrictive means. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

29. Defendants engaged in excessive entanglement with religion by deciding for the graduation speeches which religious references are acceptable and which are not, in violation of Plaintiff's rights of religious liberty as guaranteed by the Establishment Clause of the First Amendment to the United States Constitution, for which Defendants, and each of them, are liable. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have

known of said rights and that their actions violated those clearly established rights.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CAUSE OF ACTION
(Violation of Federal Constitutional Rights of Equal Protection - All Defendants)

30. Plaintiff incorporates fully herein by reference the allegations contained in Paragraphs 1 through 29 above.

31. Defendants singled out Plaintiff's speech for censorship for the sole reason that the speech contained religious statements, in violation of Plaintiff's rights of equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution, for which Defendants, and each of them, are liable. Said actions were made without any compelling state interest, and were not made with the least restrictive means. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

WHEREFORE, Plaintiff prays for relief as set forth below.

FOURTH CAUSE OF ACTION
(Violation of State Constitutional Rights of Free Speech - All Defendants)

32. Plaintiff incorporates fully herein by reference the allegations contained in Paragraphs 1 through 31 above.

33. Defendants censored Plaintiff's speech specifically for religious references and prevented him from expressing his

beliefs and religion, in violation of Plaintiff's rights of free speech as guaranteed by Article 1, Section 2 of the California Constitution, for which Defendants, and each of them, are liable. Said actions were made without any compelling state interest, and were not made with the least restrictive means. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

WHEREFORE, Plaintiff prays for relief as set forth below.

FIFTH CAUSE OF ACTION
(Violation of State Constitutional Rights of Religious Liberty - All Defendants)

34. Plaintiff incorporates fully herein by reference the allegations contained in Paragraphs 1 through 33 above.

35. Defendants prevented Plaintiff from expressing his own religious beliefs in his own graduation speech, in violation of Plaintiff's rights of religious liberty as guaranteed by the Free Exercise Clause contained in Article 1, Section 4 of the California Constitution, for which Defendants, and each of them, are liable. Said actions were made without any compelling state interest, and were not made with the least restrictive means. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

36. Defendants engaged in excessive entanglement with religion by deciding for the graduation speeches which religious references are acceptable and which are not, in

violation of Plaintiff's rights of religious liberty as guaranteed by the Establishment Clause contained in Article 1, Section 4 of the California Constitution, for which Defendants, and each of them, are liable. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

WHEREFORE, Plaintiff prays for relief as set forth below.

SIXTH CAUSE OF ACTION
(Violation of State Constitutional Rights of Equal Protection - All Defendants)

37. Plaintiff incorporates fully herein by reference the allegations contained in Paragraphs 1 though 36 above.

38. Defendants singled out Plaintiff's speech for censorship for the sole reason that the speech contained religious statements, in violation of Plaintiff's rights of equal protection as guaranteed by Article 1, Section 7 of the California Constitution, for which the Defendants, and each of them are liable. Said actions were made without any compelling state interest, and were not made with the least restrictive means. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

WHEREFORE, Plaintiff prays for relief as set forth below.

SEVENTH CAUSE OF ACTION

(Violation of State Rights Against Creed Discrimination Under Education Code § 51500 – All Defendants)

39. Plaintiff incorporates fully herein by reference the allegations contained in Paragraphs 1 through 38.

40. Defendants' censorship of Plaintiff's speech and specific religious references therein, reflected adversely upon Plaintiff because of his creed, in violation of Plaintiff's rights against creed discrimination as guaranteed by California Education Code Section 51500, for which Defendants, and each of them, are liable. Moreover, these civil rights of Plaintiff were clearly established, and Defendants knew or should have known of said rights and that their actions violated those clearly established rights.

WHEREFORE, Plaintiff prays for relief as set forth below.

PRAYER

WHEREFORE, Plaintiff prays for judgment against all Defendants as follows:

1. Compensatory damages in excess of the jurisdictional limits of this court;

2. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 (b) and California Civil Code § 1021.5;

3. Costs of suit herein incurred; and

4. Such other and further relief as the Court may deem proper.

Dated: June 16, 2000

STODDARD, PFEIFFER,
BERGQUIST & WOOD, LLP

_____

Steven N.H. Wood, Esq.
Attorneys for Plaintiff
NICHOLAS LASSONDE
Participating Attorneys for
THE RUTHERFORD
INSTITUTE

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury.

Dated: June 16, 2000

STODDARD, PFEIFFER,
BERGQUIST & WOOD, LLP

___/S/_____

Steven N.H. Wood, Esq.
Attorneys for Plaintiff
NICHOLAS LASSONDE

Participating Attorneys for
THE RUTHERFORD
INSTITUTE

EXHIBIT A

I would like to dedicate the following speech to my grandfather. He had planned to be sitting out in the audience today, but last Saturday he went home to be with the Lord. While he would have enjoyed seeing me give this speech, I am certain that he is in a much better place right now.

In the future, humans will live on the moon.

In the future, there will be manned visits to Jupiter.

In the future, sickness will be eradicated.

In the future, babies they will be born in test tubes.

In the future, Big Brother will be watching you.

The future is not what it used to be.

Roughly thirty years ago, our parents graduated from high school. They sat in the stands and listened to many people tell them that they were the future. But they lived in a different world than we live in now. The Civil Rights movements were only a few years old. Neil Armstrong had just stepped on the moon. President Nixon was still in office. Our parents were told that they were the future, that they could make this world a better place. It is my opinion that they were less than successful.

It is said that we reap what we sow. Some of the seeds that our parents generation sowed were: "Don't trust anyone over 30", "Make Love not War", "If it feels good, do it". Today we are reaping the fruits of those seeds. The headlines of our time include the O.J. Simpson trial, the Oklahoma City bombing,

President Clinton's impeachment trials, school shootings, and violent arguments about abortion on demand as an acceptable method of birth control. The morals of this country are dying, and I am supposed to say that we are the future? That everything will turn out great? No, I want to tell you that we need to change. We don't need stricter laws. We don't need more government spending. We need to focus our attention on that which is truly important.

We stand now at a crossroad. Some of us are going to college. Some are heading straight to work. Others are still undecided on the path to take. But one thing is certain; the next few years will play a strong part on our lives. Our time at Amador has been fun, but it has been somewhat sheltered. We now step into the hostile world, where the careless are caught up in grief and disparity. We have been trained to use our best abilities to stay on track, and now it is time for us to be tested. Some will stumble and some will fall. Our abilities and friends might fail us, but there is one source of support that is never changing. *[I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of "modern society".*

As Psalm 146 says, "Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea, and everything in them-- the Lord, who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the Lord loves the righteous. The Lord watches over the alien and sustains the fatherless and the widow, but he frustrates the ways of the wicked."]

Historians are constantly reminding us that if we fail to remember history, we are doomed to repeat it. History is full of examples of nations that have fallen because of their moral decay. Change does not come easy. Radical change only happens when a new generation takes over. The moral values of my grandfather's generation were radically changed by our parent's generation. As we step into the leadership role, we have the opportunity to learn from their errors and reestablish this nation's sense of morality and accountability. As philosophers are fond of saying, the future is ours, but we must "Seize the day!"

When all is said and done, it does not matter how much money you have made. Nor does it matter how many degrees you earned. Nor does it matter how many people you have met. What truly matters is if you have invested your time not in what is here today and gone tomorrow, but in that which lives forever, your soul. *["For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." Have you accepted the gift, or will you pay the ultimate price?]*

Amador Valley High School Class of 1999, Good Luck and God Bless! The future is waiting.

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A Professional corporation
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Walnut Creek, CA 94596
Tele: (925) 974-8600

Attorney for Defendants,
PLEASANTON UNIFIED SCHOOL DISTRICT;
MARY FRANCES CALLAHAN; JIM NEGRI; and
BILL COUPE

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LASSONDE, CASE NO.: C 00 2150

Plaintiff, Defendants' Answer to Complaint

vs.

PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAHAN, individually and as Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, JIM NEGRI, individually and as Assistant Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, and BILL COUPE, individually

and as Principal of AMADOR
VALLEY HIGH SCHOOL,

Defendants.
_____/

Defendants, the PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAHAN, JIM NEGRI, and BILL COUPE, hereby respond to plaintiff's complaint for damages by admitting, denying, and raising the following affirmative defenses.

Paragraph 1

Defendants admit that plaintiff is now an adult, and that he has brought this action against the school district and its representatives, claiming damages arising out of violations of free speech, religious freedom, and equal protection, where in plaintiff is claiming censorship of religious content in his high school graduation salutatorian speech given on June 18, 1999. All other allegations contained within this paragraph are denied.

Paragraph 2

Defendants admit that jurisdiction is appropriate in the federal court in that jurisdiction is grounded upon a federal question. Defendants also admit that plaintiff claims in this action that defendants violated plaintiff's rights of free speech, religious freedom and equal protection of civil rights secured by the First and Fourteenth Amendments, and under 42 U.S.C. §§ 1983, 1988. All other allegations contained within this paragraph are denied.

Paragraph 3

Defendants admit that supplemental jurisdiction is appropriate within this court, should this court agree to accept supplemental jurisdiction, for the non-federal claims. All other allegations in this paragraph are denied.

Paragraph 4

Defendants admit that venue is appropriate in Northern District of California since all or a substantial events giving rise to plaintiff's alleged claims occurred within this jurisdiction, in particular, Alameda County, California. All other allegations contained within this paragraph are denied.

Paragraph 6

Defendants admit that plaintiff is and at all relevant times was a citizen of the United States of America and of the State of California, who resided within the City of Pleasanton, County of Alameda, California. The defendants also admit that plaintiff graduated from Amador Valley High School in Pleasanton on June 18, 1999. Defendants lack sufficient information and belief upon which to admit or deny the plaintiffs "principal place of residence", and as such, that allegation is denied.

Paragraph 11

Defendants deny each and every allegation contained within paragraph 11 of plaintiff's complaint.

Paragraph 12

Defendants deny each and every allegation contained within paragraph 12 of plaintiff's complaint.

Paragraph 13

Defendants admit that plaintiff has complied with the claims requirements of the California Government Tort Claims Act. The remaining allegations contained within this paragraph, in particular, that plaintiff has timely commenced this action, are denied.

Paragraph 14

Defendants lack sufficient information and belief upon which to admit or deny the allegations contained within this paragraph, and as such, these allegations are denied.

Paragraph 16

Defendants admit that Amador Valley High School did have a tradition of having a valedictorian and salutatorian selected on the basis of their earned grade point average, and to present a speech at graduation ceremonies. The remaining allegations contained within this paragraph are denied.

Paragraph 18

Defendants do admit that plaintiff was informed by Principal, Bill Coupe, of Principal Coupe's desire to review plaintiff's speech prior to its being given at the graduation ceremony. The remaining allegations contained within this paragraph are denied.

Paragraph 19

Defendants admit that plaintiff wrote a speech which discussed "the disasters and horrors of the past thirty years and which exhorted his fellow graduates to work toward a better future. His speech included quotations from the Bible, specifically Psalm 146:3-9 and Romans 6:23, and expressed his desire for his fellow graduates to develop a personal relationship with God and Jesus in order to better their lives." Defendants also admit that the full text of the speech is attached to plaintiff's complaint, marked as Exhibit A. With respect to the other allegations within this paragraph, defendants lack sufficient information and belief upon which to speculate as to plaintiff's state of mind, and as such, the remaining allegations not so admitted are denied.

Paragraph 20

Defendants admit that Principal, Bill Coupe, spoke to plaintiff regarding his graduation speech subsequent to Principal Coupe having reviewed it himself. Principal Coupe also discussed the content of the graduation speech prepared by the plaintiff with an attorney for the school district, Karen Rezendes. The remaining allegations within this paragraph a re denied.

Paragraph 21

Defendants admit that Principal Bill Coupe, Assistant Superintendent James Negri, and Pleasanton Unified School District general counsel, Karen Rezendes, informed plaintiff that it was inappropriate for plaintiff to use several sentences in his speech, because those portions of the speech constituted inappropriate entanglement of church and state. Defendants also

inform that at some point in time, they informed plaintiff that he needed to delete those portions of his speech, or that the speech could not be provided at all. Defendants also admit that the portions of the speech which plaintiff was so informed to redact, are indicated in bold face on Exhibit A. The remaining allegations contained within this paragraph are denied.

Paragraph 22

Defendants do admit that before the graduation ceremony, plaintiff, and an attorney from the Rutherford Institute, took the position that defendants' request to delete certain language from plaintiff's speech, constituted a violation of plaintiff's civil rights. Defendants also admit that a request was made to defendants to incorporate somehow a disclaimer and allow plaintiff to give his full speech at the graduation ceremony. The request for the disclaimer was rejected by the defendants, since based upon the advice of counsel, defendants believed that such a disclaimer would not cure the illegality of the language which plaintiff wished to maintain within his graduation speech.

Paragraph 23

Defendants admit that the Amador Valley High School graduation ceremony for the Class of 1999 was held off campus at the Alameda County Fairgrounds Amphitheater. Defendants do add that the school district was required to execute a written lease agreement so to secure the amphitheater for the ceremony. Defendants also admit that Amador Valley High School students were not required to attend the graduation ceremony to graduate or to obtain their degree. All other allegations within this paragraph are denied.

Paragraph 24

Defendants admit that at the Amador Valley High School graduation ceremony on June 18, 1999, one of the Masters of Ceremonies was Principal Bill Coupe. Defendants also admit that plaintiff presented his speech at the graduation ceremony, with the offending language omitted. Defendants further admit that at the graduation ceremony, and during the course of his speech, plaintiff was allowed to explain to the audience that portions of his planned graduation speech had been omitted at the request of the School District, but that a full copy of the graduation speech was available for those who wished to secure a copy after the graduation ceremony. All other allegations within this paragraph are denied.

Denials

Defendants deny each and every allegation contained within paragraphs 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, and 40 of plaintiff's complaint.

AFFIRMATIVE DEFENSES

AS A SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that neither the Complaint nor any of the alleged causes of action therein state facts sufficient to constitute a cause of action against this answering Defendant.

AS A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants

allege that said damages sustained by Plaintiff were either wholly, or in part, negligently caused by persons, firms, corporations or entities other than these answering Defendants, and said negligence comparatively reduces the percentage of negligence, if any, by these answering Defendants.

AS A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that Plaintiff failed to mitigate his alleged damages as required by law.

AS A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that with respect to the seventh cause of action of the complaint, seeking to bring an action under Education Code § 51500, that that section does not provide an actionable mandatory duty, upon which the plaintiff can sue for damages.

AS A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that they are immune from the allegation and the causes of action contained within plaintiff's complaint, based upon the absolute and qualified immunities afforded to them under federal and state law.

AS A SIXTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that Plaintiff does not have a clearly established constitutional

right under either federal or state law, upon which plaintiff can sue for the alleged violation thereof against these answering defendants.

AS A SEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that at all times relevant to the allegations contained within the complaint, they possessed a good faith, qualified immunity, in that, they were acting upon their good faith belief that their actions were lawful and appropriate.

AS A EIGHTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that plaintiff consented to the events that occurred as alleged in the Complaint, and as such, plaintiff's own consent has waived any said cause of action so alleged.

AS A NINTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that Plaintiff does not possess an unfettered, unchecked right to proselytize his religious beliefs during the graduation ceremony so referenced in the complaint, since to allow such would constitute an excessive entanglement between church and state, which is violative of the California and United State Constitutions.

AS A TENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that plaintiff lacks the necessary standing within which to bring these causes of actions and claims.

AS A ELEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that plaintiff is estopped from bringing the causes of action contained within the complaint based on the doctrine of laches.

AS A TWELFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO PLAINTIFF'S UNVERIFIED COMPLAINT ON FILE HEREIN, these answering Defendants allege that at all times referenced in the complaint, they possessed an honest and good faith belief with respect to the conduct so pursued and undertaken with respect to plaintiff.

PRAYER

WHEREFORE, these answering defendants pray as follows:

1. The plaintiff take nothing by his complaint and that these answering defendants be dismissed hence;

2. For reasonable attorney's fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court deems appropriate.

STUBBS & LEONE
A Professional Corporation
____/s/_____
LOUIS A. LEONE, ESQ.
Attorneys for Defendants

F1

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LASSONDE, CASE NO.: C 00 2150

Plaintiff, Defendants' Separate Statement of Uncontroverted Material Facts and References to Supporting Evidence

vs.

PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAHAN, individually and as Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, JIM NEGRI, individually and as Assistant Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, and BILL COUPE, individually and as Principal of AMADOR VALLEY HIGH SCHOOL,

Defendants.
_____/

DEFENDANTS' SEPARATE STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND REFERENCES TO SUPPORTING EVIDENCE

Defendants PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAHAN, individually and as

Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, JIM NEGRI, individually and as Assistant Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, and BILL COUPE, individually and as Principal of AMADOR VALLEY HIGH SCHOOL, hereby submit the following Statement of Uncontroverted Material Facts, together with References to Supporting Evidence, by virtue of which it is established that there are no genuine issues as to any material fact and that Defendants are entitled to judgment as a matter of law.

Uncontroverted Material Fact	Supporting Evidence
1. Plaintiff NICHOLAS LASSONDE ("Lassonde"), a graduating senior in the AMADOR VALLEY HIGH SCHOOL ("AVHS" or "Amador High"), class of 1999, by virtue of his grade point average earned the opportunity to deliver a Salutatorian speech at the school's graduation ceremony.	1. Complaint for damages and Attorneys' Fees, filed June 16, 2000, on file herein ("Complaint"), ¶¶6,15,16,17.
2. As he does each year, Defendant and AVHS Principal, BILL COUPLE (Mr. Coupe") asked to review the text of Lassonde's proposed speech in advance of graduation day. Mr. Coupe maintains control and	2. Declaration of Bill Coupe in Support of Defendants' Motion for Summary Judgment ("Coupe Dec."), ¶2; Complaint, ¶¶18,20.

supervision over all aspects of the graduation ceremony.

3. Upon review of the proposed graduation speech, Mr. Coupe discovered that Lassonde intended to exhort his fellow public school graduates to "seek out the Lord...God of Jacob," and to accept the gift of "eternal life through Jesus Christ our Lord." It was Lassonde's intention to give credit and glory to God... and to spread the Word of God to others," and he acknowledges that the proposed speech expressed a desire for "his fellow graduates to develop a personal relationship with God and Jesus in order to better their lives."

3. Complaint, ¶19, Exhibit A, thereto; Coupe Dec., ¶3.

4. On the advice of counsel, Mr. Coupe informed Lassonde that such sectarian, proselytizing comments were not constitutionally permissible at a public high school graduation ceremony. More specifically, Mr. Coupe and

4. Coupe Dec., ¶3, Declaration of Karen Marie Rezendes-Tannehill in Support of Defendants' Motion for Summary Judgment ("Rezendes Decl.") ¶4; Complaint, ¶21.

Ms. Karen Marie Rezendes-Tannehill advised Lassonde that references to God, as it related to his own beliefs, were permissible, but that "preaching," or "proselytizing" speech violated the Constitution.

5. Following multiple discussion between Lassonde's counsel and counsel for the school district, it was agreed that Mr. Lassonde would deliver his speech with the constitutionally impermissible language excised, and hand-out the full text of the speech to graduation attendees outside the ceremony site. This agreement was carried out.

5. Coupe Dec., ¶4; Rezendes Decl., ¶5; Complaint, ¶24.

6. Although the Graduation Ceremony took place at the Alamada County Fairgrounds, it was entirely under the auspices of the Amador Valley High School. The ceremony was only open to students and their invited guests, not to members of the general public.

6. Coupe Dec., ¶¶5,6 and Exhibits thereto.

AVHS provided insurance for the event under the Pleasanton Unified School District policy. AVHS paid for the Amphitheater rental and for the cost of security guards. The ceremony program identified the event as the "Amador Valley High School, 76th Commencement," and lists the Pleasanton School District Board of Trustees, Superintendent, and Mr. Coupe as AVHS Principal. The names of each graduating senior are printed in the program, as well as the various awards won by individual graduating seniors. Finally, each participant in the actual program was either an AVHS student, faculty member or administrator, or School District employee or Trustee.

Respectfully submitted,

STUBBS & LEONE
A Professional Corporation

May 1, 2001

LOUIS A. LEONE, ESQ. /s/
Attorneys for Defendants
PLEASANTON UNIFIED SCHOOL

F6

DISTRICT, MARY FRANCES
CALLAHAN, JIM NEGRI, and BILL
COUPE

G1

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LASSONDE, CASE NO.: C 00 2150

Plaintiff,

vs.

PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAHAN, individually and as Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, JIM NEGRI, individually and as Assistant Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, and BILL COUPE, individually and as Principal of AMADOR VALLEY HIGH SCHOOL,

Defendants.
_____/

Plaintiff's Response to Defendants' Separate Statement of Uncontroverted Material Facts and Plaintiff's Statement of Additional Un-Controverted Material Facts, In Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment or Alternatively Summary Adjudication

PLAINTIFF'S RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF ADDITIONAL UNCONTROVERTED MATERIAL FACTS, IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY SUMMARY ADJUDICATION

DEFENDANTS' ALLEGED UNCONTROVERTED MATERIAL FACTS AND EVIDENCE	PLAINTIFF'S RESPONSE
1. Plaintiff NICHOLAS LASSONDE ("Lassonde"), a graduating senior in the AMADOR VALLEY HIGH SCHOOL ("AVHS" or "Amador High"), class of 1999, by virtue of his grade point average earned the opportunity to deliver a Salutatorian speech at the school's graduation ceremony. Evidence: Complaint for Damages and Attorneys' Fees, filed June 16, 2000, on file herein, ("Complaint"), ¶¶6,15,16,17.	1. Admitted.
2. As he does each year, Defendant and AVHS Principal, BILL COUPE ("Mr. Coupe") asked to review the text of Lassonde's proposed speech in advance of	2. Plaintiff does not dispute the facts set forth in Defendants' Uncontroverted Material Fact no. 2, except insofar as it suggests that Defendant COUPE had a policy or

graduation day. Mr. Coupe maintains control and supervision over all aspects of the graduation ceremony.

Evidence: Declaration of Bill Coupe in Support of Defendants' Motion for Summary Judgment ("Coupe Decl.") ¶2; Complaint, ¶¶18,20.

practice of reviewing the text of proposed graduation speeches prior to reviewing Plaintiff's in June 1999. According to Mr. COUPE's Declaration, he has served as Principal of Amador Valley High School ("AVHS") "for the last 3 years, since 1998." Consequently, he would have reviewed graduation speeches *for the first time* in June 1999. In the absence of a written policy of either the District or AVHS to that effect (and Plaintiff is unaware of any), Mr. COUPE's first-time review of graduation speeches for Plaintiff's graduation ceremony could not be regarded as a policy or practice at the time of the events giving rise to this lawsuit. Plaintiff also takes issue with Mr. COUPE's statement that he exercised review of the proposed speeches "based on my control and supervision over all aspects of the graduation ceremony," insofar as it purports to accord Mr.

	COUPE any lawful authority in contravention of the First Amendment to the United States Constitution or California Educ. Code § 48950.
3. Upon review of the proposed graduation speech, Mr. Coupe discovered that Lassonde intended to exhort his fellow public school graduates to "seek out the Lord...God of Jacob," and to accept the gift of "eternal life through Jesus Christ our Lord." It was Lassonde's intention to give credit and glory to God... and to spread the Word of God to others," and he acknowledges that the proposed speech expressed a desire for "his fellow graduates to develop a personal relationship with God and Jesus in order to better their lives." Evidence: Complaint, ¶19, Exhibit A, thereto; Coupe Decl., ¶3.	3. Admitted.

4. On the advice of counsel, Mr. Coupe informed Lassonde that such sectarian, proselytizing comments were not constitutionally permissible at a public high school graduation ceremony. More specifically, Mr. Coupe and Ms. Karen Marie Rezendes-Tannehill advised Lassonde that references to God, as it related to his own beliefs, were permissible, but that "preaching," or "proselytizing" speech violated the Constitution.

Evidence: Coupe Decl., ¶3, Declaration of Karen Maria Rezendes-Tannehill in Support of Defendants' Motion for Summary Judgment ("Rezendes Decl."), ¶4; Complaint, ¶21.

4. Admitted.

5. Following multiple discussion between Lassonde's counsel and counsel for the school district, it was agreed that Mr. Lassonde would deliver his speech with the constitutionally

5. Plaintiff disputes these facts to the extent that they imply that some form of "agreement" existed between Plaintiff and Defendants. The compromise worked out between the parties was not regarded by

impermissible language excised, and hand-out the full text of the speech to graduation attendees outside the ceremony site. The agreement was carried out.

Evidence: Coupe Decl., ¶4; Rezendes Decl., ¶5; Complaint, ¶24.

either Plaintiff or his counsel as a legal "agreement" or waiver of Plaintiff's right to present his speech uncensored of religious references. Plaintiff acceded to the School's order that he give his speech in a censored form, but expressly stated that he was doing so under protest and reserving his rights. Declaration of Steven N.H. Wood ("Wood Dec."), ¶7; Declaration of Nicholas Lassonde, ("N. Lassonde Dec."), ¶12. Plaintiff also objects to the legal conclusion that the censored portion of the speech was "constitutionally impermissible."

6. Although the Graduation Ceremony took place at the Alamada County Fairgrounds, it was entirely under the auspices of the Amador Valley High School. The ceremony was only open to students and their invited guests, not to members of the general public. AVHS provided insurance for the event under the Pleasanton Unified School District policy.

6. Admitted.

AVHS paid for the Amphitheater rental and for the cost of security guards. The ceremony program identified the event as the "Amador Valley High School, 76th Commencement," and lists the Pleasanton School District Board of Trustees, Superintendent, and Mr. Coupe as AVHS Principal. The names of each graduating senior are printed in the program, as well as the various awards won by individual graduating seniors. Finally, each participant in the actual program was either an AVHS student, faculty member or administrator, or School District employee or Trustee.

PLAINTIFF'S ADDITIONAL UNCONTROVERTED MATERIAL FACTS

UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
7. Plaintiff subscribes to the historic Protestant Christian faith. He has a personal conviction that a personal relationship with God through His only Son, Jesus Christ, is the most beneficial relationship an individual can have.	7. N. Lassonde Dec., ¶ 2.
8. Plaintiff believes he is commanded by his faith to give credit and glory to God in all circumstances and to spread the Word of God, the Bible, to others.	8. N. Lassonde Dec., ¶ 2.
9. Based solely upon my grade point average of 4.24, Plaintiff earned the position of being one of two Salutatorians for my graduating Class of 1999 from AVHS.	9. N. Lassonde Dec., ¶ 3.
10. AVHS has a tradition of having its Valedictorian and Salutatorian, chosen solely on the basis of their earned grade point averages, present a speech at the graduation	10. N. Lassonde Dec., ¶ 4.

ceremonies.

11. On May 19, 1999, the Principal of AVHS, Defendant BILL COUPE, informed Plaintiff that he was one of two Salutatorians. In line with the tradition of AVHS, Principal COUPE also then informed Plaintiff that he could give a speech at the graduation ceremony.

11. N. Lassonde Dec., ¶ 5.

12. Plaintiff was given no guidelines on the topic of his speech, as long as the topic was not profane. Nor was Plaintiff or his legal counsel informed of any school policy with respect to the content of such speeches. Plaintiff was informed, however, that Principal COUPE wanted to review the speech prior to its being given.

12. N. Lassonde Dec., ¶ 6; Declaration of Steven N. H. Wood ("Wood Dec."), ¶ 5.

13. Plaintiff determined that his speech would discuss the disasters and horrors of the past thirty years and exhort his fellow graduates to work toward a better future.

13. N. Lassonde Dec., ¶ 7.

Plaintiff's speech included quotations from the Bible, specifically Psalm 146:3-9 and Romans 6:23, and expressed his desire for his fellow graduates to develop a personal relationship with God through faith in Christ in order to better their lives.

14. Plaintiff drafted his speech and chose these references in obedience to his religious convictions that commanded him to give credit and glory to God in all circumstances and to spread the Word of God to others.

14. N. Lassonde Dec., ¶ 7.

15. On June 16, 1999, Defendant COUPE called Plaintiff into his office to review his graduation speech. Principal COUPE said that he had to check with the school's lawyers about the speech given its references to God and Jesus.

15. N. Lassonde Dec., ¶ 9.

16. On June 17, 1999, the day before the graduation, Principal COUPE, Assistant

16. N. Lassonde Dec., ¶10; Wood Dec., ¶¶2,6.

Superintendent Defendant JIM NEGRI and Pleasanton Unified School District ("PUSD") General Counsel Karen Rezendes informed Plaintiff that he could not present certain portions of the speech because they constituted "proselytizing" or "preaching." They told Plaintiff that he had to either change his speech to remove the offending portions, or he could not give a speech at all.

17. Later on June 17, 1999, the day before the graduation, Plaintiff and his legal counsel (via telephone) participated in an appeal hearing held before the Superintendent's designee, Defendant Assistant Superintendent Jim Negri, discussing the District's position on Plaintiff's speech. Plaintiff and his counsel asserted to PUSD that their censorship violated Nicholas' civil rights.

17. Wood Dec., ¶6.

18. Plaintiff's counsel explained to PSUD that the District could avoid any perceived problem by providing a standard

18. Wood Dec., ¶6.

disclaimer to clarify that the student speakers at graduation do not represent the views of PSUD.

19. Plaintiff's counsel discussed how this action would minimize the risk to the school by allowing the school to, on one hand, negate any appearance of endorsement of the "proselytizing" content of the speech and, on the other, keep school authorities from becoming entangled in having to determine which portions of the speech were excessively "proselytizing" or "sectarian."

19. Wood Dec., ¶6.

20. PSUD maintained its position and rejected the use of a disclaimer.

20. Wood Dec., ¶6.

21. Defendants stated that "no proselytizing would be allowed," and that it was "okay to thank God but not to preach."

21. Wood Dec., ¶6.

22. AVHS held its graduation ceremony for the Class of 1999 off campus at the Alameda

22. N. Lassonde Dec., ¶ 13.

County Fairgrounds Amphitheater on June 18, 1999. AVHS students were not required to attend the graduation ceremony to graduate or obtain their degree.

23. At the AVHS graduation ceremony on June 18, 1999, Plaintiff presented his speech at the graduation ceremony but omitted the portions that the Defendants had forbidden him from presenting. When he came to both censored portions, I informed the audience that the school had not permitted him to give that part of the speech because it deemed it "inappropriate," and that copies of the uncensored speech would be available outside the ceremony afterwards and posted on his web site, and that he would be presenting the speech at his church that Sunday. At this point, the majority of the audience stood and cheered, apparently appreciating the stand he was taking for his right to free speech and expressing

23. N. Lassonde Dec., ¶ 14.

their desire to hear all that he had to say, not just what the school thought was appropriate.

24. As a result of the Defendants' censorship, Plaintiff felt that his views as a Christian were disfavored by the school, and that because of his status as a religious individual, he alone among the student speakers had his speech censored. Plaintiff felt, and still feels, that he was denied a right he had earned, the right to express who he was and how he came to achieve the honor of being Salutatorian, based solely on his Christian viewpoint.

24. N. Lassonde Dec., ¶ 15.

25. Although Plaintiff was able to present the censored version of the speech, he felt, and still feels, that the censored portions were the most important part of the speech, for they contained the central message that Plaintiff felt not only explained who he was as a person, but answered the question implicitly

25. N. Lassonde Dec., ¶ 16.

addressed in any graduation speech; how others could follow his example of success and happiness. He believed, and sought to state, that "success" and happiness in this life depend not on material wealth or personal fulfillment, but upon knowing who God is as our Creator and Heavenly Father and experiencing the meaning of life for themselves, as it is stated in the Westminster Confession - "To know God and to enjoy Him forever."

26. Plaintiffs' parents, Ron Lassonde and Cindy Lassonde, as fellow Christian believers with Plaintiff, felt that Defendants' statements that Plaintiff's speech had to be censored of any "proselytizing" or "preaching" references communicated disfavor of their views by the District and Defendants as being too "offensive" to state publicly.

26. Declaration of Cindy Lassonde ("C. Lassonde Dec."), ¶6; Declaration of Ron Lassonde ("R. Lassonde Dec."), ¶6.

27. Ron and Cindy Lassonde were particularly offended by

27. C. Lassonde Dec., ¶6; R. Lassonde Dec., ¶6.

the notion that PUSD's lawyer and the AVHS principal could determine which parts of Plaintiff's speech were too "proselytizing" or "preaching" to remain.

28. Ron and Cindy Lassonde attended the graduation ceremony on June 18, 1999. As evangelical Christians, they felt that the censorship engaged in by Defendants communicated that their views were regarded negatively by the School District and the political majority in the community whose views it represented.

28. C. Lassonde Dec., ¶7; R. Lassonde Dec., ¶7.

29. As evangelical Christians, Ron and Cindy Lassonde felt that the censored portions were the most important part of Plaintiff's speech, as they contained the central message that they felt not only explained who Nick was as a person, but answered the question implicitly addressed in any graduation speech; how others could follow his example of success

29. C. Lassonde Dec., ¶7; R. Lassonde Dec., ¶7.

and happiness.

30. Ron and Cindy Lassonde believe, with Plaintiff and other Christian members of the audience they know, that "success" and happiness in this life depend not on material wealth or personal fulfillment, but upon knowing who God is as our Creator and Heavenly Father and experiencing the meaning of life for themselves; as it is stated in the Westminster Confession - "To know God and to enjoy Him forever."	30. C. Lassonde Dec., ¶7; R. Lassonde Dec., ¶7.

Respectfully submitted,

June 29, 2001

STODDARD, PFEIFFER, BERGQUIST & WOOD, LLP

/S/

STEVEN N. H. WOOD, ESQ.
Attorneys for Plaintiff
NICHOLAS LASSONDE

H1

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LASSONDE, CASE NO.: C 00 2150

Plaintiff,

vs.

Defendants' Response to Plaintiff's Separate Statement of Additional Uncontroverted Material Facts

PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAHAN, individually and as Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, JIM NEGRI, individually and as Assistant Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, and BILL COUPE, individually and as Principal of AMADOR VALLEY HIGH SCHOOL,

Defendants.
_____/

DEFENDANTS' RESPONSE TO PLAINTIFF'S SEPARATE STATEMENT OF ADDITIONAL UNCONTROVERTED MATERIAL FACTS

Defendants, respond to plaintiff's separate statement of additional facts as follows:

PLAINTIFF'S ADDITIONAL UNCONTROVERTED MATERIAL FACTS	DEFENDANTS' RESPONSE
7. Plaintiff subscribes to the historic Protestant Christian faith. He has a personal conviction that a personal relationship with God through His only Son, Jesus Christ, is the most beneficial relationship an individual can have. Evidence: N. Lassonde Dec., ¶2.	7. Objection. Irrelevant statements of religious belief.
8. Plaintiff believes he is commanded by his faith to give credit and glory to God in all circumstances and to spread the Word of God, the Bible, to others. Evidence: N. Lassonde Dec., ¶2.	8. Objection. Irrelevant statements of religious belief.
9. Based solely upon his grade point average of 4.24, Plaintiff earned the position of being one of two Salutatorians for his graduating Class of 1999 from	9. Admitted.

AVHS.

Evidence: N. Lassonde Dec., ¶3.

10. AVHS has a tradition of having its Valedictorian and Salutatorian, chosen solely on the basis of their earned grade point averages, present a speech at the graduation ceremonies.

Evidence: N. Lassonde Dec., ¶4.

10. Admitted.

11. On May 19, 1999, the Principal of AVHS, Defendant BILL COUPE, informed Plaintiff that he was one of two Salutatorians. In line with the tradition of AVHS, Principal COUPE also then informed Plaintiff that he could give a speech at the graduation ceremony.

Evidence: N. Lassonde Dec., ¶5.

11. Admitted.

12. Plaintiff was given no

12. Denied.

guidelines on the topic of his speech, as long as the topic was not profane. Nor was Plaintiff or his legal counsel informed of any school policy with respect to the content of such speeches. Plaintiff was informed, however, that Principal COUPE wanted to review the speech prior to its being given.

Evidence: N. Lassonde Dec., ¶6; Wood Dec., ¶5.

13. Plaintiff determined that his speech would discuss the disasters and horrors of the past thirty years and exhort his fellow graduates to work toward a better future. Plaintiff's speech included quotations from the Bible, specifically Psalm 146:3-9 and Romans 6:23, and expressed his desire for his fellow graduates to develop a personal relationship with God through faith in Christ in order to better their lives.

13. Admitted.

Evidence: N. Lassonde Dec.,

¶7.

14. Plaintiff drafted his speech and chose these references in obedience to his religious convictions that commanded him to give credit and glory to God in all circumstances and to spread the Word of God to others. Evidence: N. Lassonde Dec., ¶7.	14. Objection, irrelevant.
15. On June 16, 1999, Defendant COUPE called Plaintiff into his office to review his graduation speech. Principal COUPE said that he had to check with the school's lawyers about the speech given its references to God and Jesus. Evidence: N. Lassonde Dec., ¶9.	15. Admitted.
16. On June 17, 1999, the day before the graduation, Principal	16. Admitted.

COUPE, Assistant Superintendent Defendant JIM NEGRI and Pleasanton Unified School District ("PUSD") General Counsel Karen Rezendes informed Plaintiff that he could not present certain portions of the speech because they constituted "proselytizing" or "preaching." They told Plaintiff that he had to either change his speech to remove the offending portions, or he could not give a speech at all.

Evidence: N. Lassonde Dec., ¶10; Wood Dec., ¶¶2,6.

17. Later on June 17, 1999, Plaintiff and his legal counsel (via telephone) participated in an appeal hearing held before the Superintendent's designee, Defendant Assistant Superintendent Jim Negri, discussing the District's position on Plaintiff's speech. Plaintiff and his counsel asserted to PUSD that their censorship violated Nicholas' civil rights.

17. Admitted.

Evidence: Wood Dec., ¶6.

18. Plaintiff's counsel explained to PSUD that the District could avoid any perceived problem by providing a standard disclaimer to clarify that the student speakers at graduation do not represent the views of PSUD.

18. Defendants admit that plaintiff's counsel made reference to utilizing some form of "disclaimer" but defendants deny that the proposal by plaintiff's counsel would avoid any perceived problem.

Evidence: Wood Dec., ¶6.

19. Plaintiff's counsel discussed how this action would minimize the risk to the school by allowing the school to, on one hand, negate any appearance of endorsement of the "proselytizing" content of the speech and, on the other, keep school authorities from becoming entangled in having to determine which portions of the speech were excessively "proselytizing" or "sectarian."

19. See response to no. 18.

Evidence: Wood Dec., ¶6.

20. PSUD maintained its positionand rejected the use of a disclaimer.

20. Admitted.

Evidence: Wood Dec., ¶6.

21. Defendants stated that they "cannot allow proselytizing," and that it was "okay to thank God but not to preach."

21. Admitted.

Evidence: Wood Dec., ¶6.

22. AVHS held its graduation ceremony for the Class of 1999 off campus at the Alameda County Fairgrounds Amphitheater on June 18, 1999. AVHS students were not required to attend the graduation ceremony to graduate or obtain their degree.

22. Objection. Irrelevant.

Evidence: N. Lassonde Dec. ¶13.

23. At the AVHS graduation ceremony on June 18, 1999, Plaintiff presented his speech at the graduation ceremony but omitted the portions that the Defendants had forbidden him from presenting. When he came to both censored portions, he informed the

23. Admitted with the exception of the reference to the behavior of the audience and plaintiff's characterization of what the audience "intended" on the ground that that is irrelevant and calls for speculation.

audience that the school had not permitted him to give that part of the speech because it deemed it "inappropriate," and that copies of the uncensored speech would be available outside the ceremony afterwards and posted on his web site, and that he would be presenting the speech at his church that Sunday.

At this point, the majority of the audience stood and cheered, apparently appreciating the stand he was taking for his right to free speech and expressing their desire to hear all that he had to say, not just what the school thought was appropriate.

Evidence: N. Lassonde Dec., ¶14.

24. As a result of the Defendants' censorship, Plaintiff felt that his views as a Christian were disfavored by the school, and that because of his status as a religious individual, he alone among the student speakers had his

24. Objection. Irrelevant.

speech censored. Plaintiff felt, and still feels, that he was denied a right he had earned, the right to express who he was and how he came to achieve the honor of being Salutatorian, based solely on his Christian viewpoint.

Evidence: N. Lassonde Dec., ¶15.

25. Although Plaintiff was able to present the censored version of the speech, he felt, and still feels, that the censored portions were the most important part of the speech, for they contained the central message that Plaintiff felt not only explained who he was as a person, but answered the question implicitly addressed in any graduation speech; how others could follow his example of success and happiness. He believed, and sought to state, that "success" and happiness in this life depend not on material wealth or personal fulfillment, but upon knowing who God is as our Creator and Heavenly

25. Objection. Irrelevant.

Father and experiencing the meaning of life for themselves, as it is stated in the Westminster Confession - "To know God and to enjoy Him forever."

Evidence: N. Lassonde Dec., ¶16.

26. Fellow Christian believers with Plaintiff, felt that Defendants' statements that Plaintiff's speech had to be censored of any "proselytizing" or "preaching" references communicated disfavor of their views by the District and Defendants as being too "offensive" to state publicly.

26. Objection. Irrelevant.

Evidence: Declaration of Cindy Lassonde ("C. Lassonde Dec."), ¶6; Declaration of Ron Lassonde ("R. Lassonde Dec."), ¶6.

27. Ron and Cindy Lassonde were particularly offended by the notion that PUSD's lawyer and the AVHS principal could determine which parts of

27. Objection. Irrelevant.

Plaintiff's speech were too "proselytizing" or "preaching" to remain.

Evidence: c. Lassonde Dec., ¶6; R. Lassonde Dec., ¶6.

28. Ron and Cindy Lassonde attended the graduation ceremony on June 18, 1999. As evangelical Christians, they felt that the censorship engaged in by Defendants communicated that their views were regarded negatively by the School District and the political majority in the community whose views it represented.

28. Objection. Irrelevant.

Evidence: C. Lassonde Dec., ¶7; R. Lassonde Dec., ¶7.

29. As evangelical Christians, Ron and Cindy Lassonde felt that the censored portions were the most important part of Plaintiff's speech, as they contained the central message that they felt not only explained who Nick was as a person, but answered the question

29. Objection. Irrelevant.

implicitly addressed in any graduation speech; how others could follow his example of success and happiness.

Evidence: C. Lassonde Dec., ¶7; R. Lassonde Dec., ¶7.

30. Ron and Cindy Lassonde believe, with Plaintiff and other Christian members of the audience they know, that "success" and happiness in this life depend not on material wealth or personal fulfillment, but upon knowing who God is as our Creator and Heavenly Father and experiencing the meaning of life for themselves; as it is stated in the Westminster Confession - "To know God and to enjoy Him forever."

30. Objection. Irrelevant.

Evidence: C. Lassonde Dec., ¶7; R. Lassonde Dec., ¶7.

DATED: August 16, 2001

By_____/S/_____
GREGORY E. STUBBS, ESQ.
Attorneys for Defendants
PLEASANTON UNIFIED SCHOOL SCHOOL

H14

DISTRICT, MARY FRANCES
CALLAHAN, JIM NEGRI
and BILL COUPE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LASSONDE, Plaintiff, *vs.* PLEASANTON UNIFIED SCHOOL DISTRICT, MARY FRANCES CALLAN, individually and as Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, JIM NEGRI, individually and as Assistant Superintendent of PLEASANTON UNIFIED SCHOOL DISTRICT, and BILL COUPE, individually and as Principal of AMADOR VALLEY HIGH SCHOOL, Defendants.	Case No.: C00-2150 Declaration of Steven N.H. Wood, Esq. in Support of Motion for Summary Judgment or in the Alternative, for Summary Adjudication

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Steven N. H. Wood, Counsel for the Plaintiff in the above-captioned action, hereby makes his Declaration to the Court under penalty of perjury pursuant to 28 U.S.C. Sec. 1746.

1. I am and was at all relevant times a member of the Bar of

the State of California and admitted to the United States District Court for the Northern District of California. I am counsel for Nicholas Lassonde, Plaintiff in the above-captioned action.

2. Attached hereto as Exhibit "A" is a true and correct copy of correspondence dated June 17, 1999 from General Counsel for the Pleasanton Unified School District, Karen Rezendes, to the Plaintiff's father, Mr. Ron Lassonde, constituting denial of the Plaintiff's request to present his speech uncensored on the ground that "allowing [Plaintiff] to deliver the attached speech would substantially interfere with the school's efforts to honor the philosophies and faiths of all of its students," enclosing Ms. Rezendes' copy of the speech with the censored portions circled, both of which she faxed to me on June 18, 1999.

3. Attached hereto as Exhibit "B" is a true and correct copy of a facsimile transmittal memorandum from Ms. Rezendes to me, dated June 18, 1999 with a facsimile transmittal line noting 9:31 a.m., the morning before the graduation ceremony, together with an attachment "Legal Alert" relating to "Update Regarding Student Religious Expression in School Activities," prepared by the law firm of Girard & Vinson of Sacramento. Girard & Vinson, and in particular the contact attorney at the firm referenced in the publication, Christian Keiner, were counsel for the defendant school district and its officers in *Cole v. Oroville Union High School Dist.*, Civ. S-98-1037 (U.S.D.C. E. Dist.).

4. Attached hereto as Exhibit "C" is a true and correct copy of a printout of an email correspondence the morning of the graduation on June 18, 1999 from Steven H. Aden, Esq., counsel for The Rutherford Institute, a nonprofit civil liberties organization which is assisting Plaintiff in this lawsuit, to Ms. Rezendes (that I

received by cc to my partner's email, "george@wclaw.com"), outlining Supreme Court and other authority for the use of a disclaimer to dissipate an appearance of endorsement. The attachment to the email, "peck.txt," is the entire case of *Peck v. Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998).

5. Like the Plaintiff herein, I as his counsel was given no copy of or notice of any written policy of Defendant Amador Valley High School or Pleasanton Unified School District with respect to the content of graduation speeches. Nor was I informed of or provided a copy of the Pleasanton Unified School District's "Freedom of Speech/Expression and Student Publications Code," adopted in March 1998. A true and correct copy of this code, as produced by defendants in their Initial Disclosures, is attached hereto as Exhibit "D."

6. On June 17, 1999, the day before the graduation, I participated via telephone with the Plaintiff and his father Ron Lassonde in the appeal hearing held before the Superintendent's designee, Defendant Assistant Superintendent Jim Negri, and their counsel, Ms. Rezendes, discussing the District's position on Plaintiff's speech. Nicholas Lassonde and I asserted to PUSD that their censorship violated Nicholas' civil rights. I explained to PSUD that the District could avoid any perceived problem by providing a standard disclaimer to clarify that the student speakers at graduation do not represent the views of PSUD. I discussed how this action would minimize the risk to the school by allowing the school to, on one hand, negate any appearance of endorsement of the "proselytizing" content of the speech and, on the other, keep school authorities from becoming entangled in having to determine which portions of the speech were excessively "proselytizing" or

"sectarian." Nevertheless, PSUD held fast to its censorship and rejected the use of a disclaimer. Defendants stated that they "cannot allow proselytizing," and that it was "okay to thank God but not to preach."

7. Defendants now claim in their Motion for Summary Judgment that Plaintiff or I "agreed" or engaged in some form of "agreement" that Plaintiff could give his speech with the offending language excised and that he could hand out the full text outside the ceremony grounds. Neither Nicholas nor I "agreed" to this arrangement; rather, Nicholas acceded to the School's order that he give his speech in a censored form, but we expressly stated that he was doing so under protest and reserving all rights.

8. I attended the ceremony held June 18, 1999 at the Alameda County Fairgrounds. At the ceremony, Plaintiff's co-Salutatorian, was allowed to state, "With all the success I have obtained, I owe a lot of thanks to others who have inspired me and assisted me. First, thank you Allah for making me mentally awake and morally straight."

9. The Valedictorian, Christina Lam, stated that one thing she had learned in her high school years was to "Never bring a thermos to school." According to plaintiff, the reference was to an incident when a thermos in a trash can was thought to pose a bomb threat; he understood that school authorities had censored this portion of Lam's speech, but that she presented it nonetheless.

10. Attached hereto as Exhibit "E" is a true and correct copy of California Education Code sections 48950 (2001), relating to "Disciplinary Sanctions for Constitutionally Protected Speech or Other Communication," and 51500 (2001), relating to "Prohibited

Instruction or Activity."

11. Attached hereto as Exhibit "F" is a true and correct copy of the Secretary of Education's "Statement on Religious Expression in the Public Schools," issued by President Clinton in May 1998.

12. Attached hereto as Exhibit "G" is a true and correct copy of "Religion in the Public Schools: A Joint Statement of Current Law," issued and endorsed by a broad coalition of religious and political advocacy organizations in April 1995.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Walnut Creek, California on the 28th day of June, 2001.

____/S/_____
Steven N. H. Wood

Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools

February 7, 2003

Introduction

Section 9524 of the Elementary and Secondary Education Act ("ESEA") of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary to issue guidance on constitutionally protected prayer in public elementary and secondary schools. In addition, Section 9524 requires that, as a condition of receiving ESEA funds, a local educational agency ("LEA") must certify in writing to its State educational agency ("SEA") that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in this guidance.

The purpose of this guidance is to provide SEAs, LEAs, and the public with information on the current state of the law concerning constitutionally protected prayer in the public schools, and thus to clarify the extent to which prayer in public schools is legally protected. This guidance also sets forth the responsibilities of SEAs and LEAs with respect to Section 9524 of the ESEA. As required by the Act, this guidance has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law. It will be made available on the Internet through the Department of Education's web site (www.ed.gov). The guidance will be updated on a biennial basis, beginning in September 2004, and provided to SEAs, LEAs, and the public.

The Section 9524 Certification Process

In order to receive funds under the ESEA, an LEA must certify in writing to its SEA that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance. An LEA must provide this certification to the SEA by October 1, 2002, and by October 1 of each subsequent year during which the LEA participates in an ESEA program. However, as a transitional matter, given the timing of this guidance, the initial certification must be provided by an LEA to the SEA by March 15, 2003.

The SEA should establish a process by which LEAs may provide the necessary certification. There is no specific Federal form that an LEA must use in providing this certification to its SEA. The certification may be provided as part of the application process for ESEA programs, or separately, and in whatever form the SEA finds most appropriate, as long as the certification is in writing and clearly states that the LEA has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance.

By November 1 of each year, starting in 2002, the SEA must send to the Secretary a list of those LEAs that have not filed the required certification or against which complaints have been made to the SEA that the LEA is not in compliance with this guidance. However, as a transitional matter, given the timing of this guidance, the list otherwise due November 1, 2002, must be sent to the Secretary by April 15, 2003. This list should be sent to:

Office of Elementary and Secondary Education
Attention: Jeanette Lim
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The SEA's submission should describe what investigation or enforcement action the SEA has initiated with respect to each listed LEA and the status of the investigation or action. The SEA should not send the LEA certifications to the Secretary, but should maintain these records in accordance with its usual records retention policy.

Enforcement of Section 9524

LEAs are required to file the certification as a condition of receiving funds under the ESEA. If an LEA fails to file the required certification, or files it in bad faith, the SEA should ensure compliance in accordance with its regular enforcement procedures. The Secretary considers an LEA to have filed a certification in bad faith if the LEA files the certification even though it has a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance.

The General Education Provisions Act ("GEPA") authorizes the Secretary to bring enforcement actions against recipients of Federal education funds that are not in compliance with the law. Such measures may include withholding funds until the recipient comes into compliance. Section 9524 provides the Secretary with specific authority to issue and enforce orders with respect to an LEA that fails to provide the required certification to its SEA or files the

certification in bad faith.

Overview of Governing Constitutional Principles

The relationship between religion and government in the United States is governed by the First Amendment to the Constitution, which both prevents the government from establishing religion and protects privately initiated religious expression and activities from government interference and discrimination.[1] The First Amendment thus establishes certain limits on the conduct of public school officials as it relates to religious activity, including prayer.

The legal rules that govern the issue of constitutionally protected prayer in the public schools are similar to those that govern religious expression generally. Thus, in discussing the operation of Section 9524 of the ESEA, this guidance sometimes speaks in terms of "religious expression." There are a variety of issues relating to religion in the public schools, however, that this guidance is not intended to address.

The Supreme Court has repeatedly held that the First Amendment requires public school officials to be neutral in their treatment of religion, showing neither favoritism toward nor hostility against religious expression such as prayer.[2] Accordingly, the First Amendment forbids religious activity that is sponsored by the government but protects religious activity that is initiated by private individuals, and the line between government-sponsored and privately initiated religious expression is vital to a proper understanding of the First Amendment's scope. As the Court has explained in several cases, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the

Free Speech and Free Exercise Clauses protect."[3]

The Supreme Court's decisions over the past forty years set forth principles that distinguish impermissible governmental religious speech from the constitutionally protected private religious speech of students. For example, teachers and other public school officials may not lead their classes in prayer, devotional readings from the Bible, or other religious activities.[4] Nor may school officials attempt to persuade or compel students to participate in prayer or other religious activities.[5] Such conduct is "attributable to the State" and thus violates the Establishment Clause.[6]

Similarly, public school officials may not themselves decide that prayer should be included in school-sponsored events. In *Lee v. Weisman* [7], for example, the Supreme Court held that public school officials violated the Constitution in inviting a member of the clergy to deliver a prayer at a graduation ceremony. Nor may school officials grant religious speakers preferential access to public audiences, or otherwise select public speakers on a basis that favors religious speech. In *Santa Fe Independent School District v. Doe* [8], for example, the Court invalidated a school's football game speaker policy on the ground that it was designed by school officials to result in pregame prayer, thus favoring religious expression over secular expression.

Although the Constitution forbids public school officials from directing or favoring prayer, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," [9] and the Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." [10] Moreover, not all religious speech that

takes place in the public schools or at school-sponsored events is governmental speech. [11] For example, "nothing in the Constitution ... prohibits any public school student from voluntarily praying at any time before, during, or after the school day," [12] and students may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech. Likewise, local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities, [13] but they may not structure or administer such rules to discriminate against student prayer or religious speech. For instance, where schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable to the state and therefore may not be restricted because of its religious content. [14] Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience. [15] As the Supreme Court has explained: "The proposition that schools do not endorse everything they fail to censor is not complicated," [16] and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression. [17]

Applying the Governing Principles in Particular Contexts

Prayer During Noninstructional Time

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals,

and pray or study religious materials with fellow students during recess, the lunch hour, or other noninstructional time to the same extent that they may engage in nonreligious activities. While school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.

Organized Prayer Groups and Activities

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding non-curricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to pray. School authorities may disclaim sponsorship of non-curricular groups and events, provided they administer such disclaimers in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

Teachers, Administrators, and other School Employees

When acting in their official capacities as representatives of the

state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.

Moments of Silence

If a school has a "minute of silence" or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may neither encourage nor discourage students from praying during such time periods.

Accommodation of Prayer During Instructional Time

It has long been established that schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending. Similarly, schools may excuse students from class to remove a significant burden on their religious exercise, where doing so would not impose material burdens on other students. For example, it would be lawful for schools to excuse Muslim students briefly from class to enable them to fulfill their religious obligations to pray during Ramadan.

Where school officials have a practice of excusing students from class on the basis of parents' requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment. In addition, in some circumstances, based on federal or state constitutional law or pursuant to state statutes, schools may be required to make accommodations that relieve substantial burdens on students' religious exercise. Schools officials are therefore encouraged to consult with their attorneys regarding such obligations.

Religious Expression and Prayer in Class Assignments

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

Student Assemblies and Extracurricular Events

Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be

restricted because of its religious (or anti-religious) content. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

Prayer at Graduation

School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

Baccalaureate Ceremonies

School officials may not mandate or organize religious ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately

sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

Notes:

[1] The relevant portions of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...." U.S. Const. amend. I. The Supreme Court has held that the Fourteenth Amendment makes these provisions applicable to all levels of government—federal, state, and local—and to all types of governmental policies and activities. *See Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[2] *See, e.g., Everson*, 330 U.S. at 18 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

[3] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); *accord Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 841 (1995).

[4] *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating state laws directing the use of prayer in public schools); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating

state laws and policies requiring public schools to begin the school day with Bible readings and prayer); *Mergens*, 496 U.S. at 252 (plurality opinion) (explaining that "a school may not itself lead or direct a religious club"). The Supreme Court has also held, however, that the study of the Bible or of religion, when presented objectively as part of a secular program of education (*e.g.*, in history or literature classes), is consistent with the First Amendment. *See Schempp*, 374 U.S. at 225.

[5] *See Lee v. Weisman*, 505 U.S. 577, 599 (1992); *see also Wallace v. Jaffree*, 472 U.S. 38 (1985).

[6] *See Weisman*, 505 U.S. at 587.

[7] 505 U.S. 577 (1992).

[8] 530 U.S. 290 (2000).

[9] *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

[10] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

[11] *Santa Fe*, 530 U.S. at 302 (explaining that "not every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" is "the government's own").

[12] *Santa Fe*, 530 U.S. at 313.

[13] For example, the First Amendment permits public school

officials to review student speeches for vulgarity, lewdness, or sexually explicit language. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-86 (1986). Without more, however, such review does not make student speech attributable to the state.

[14] *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819 (1995); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); Santa Fe, 530 U.S. at 304 n.15. In addition, in circumstances where students are entitled to pray, public schools may not restrict or censor their prayers on the ground that they might be deemed "too religious" to others. The Establishment Clause prohibits state officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers—be they "nonsectarian" and "nonproselytizing" or the opposite—over others. *See Engel v. Vitale*, 370 U.S. 421, 429-30 (1962) (explaining that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," that "neither the power nor the prestige" of state officials may "be used to control, support or influence the kinds of prayer the American people can say," and that the state is "without power to prescribe by law any particular form of prayer"); *Weisman*, 505 U.S. at 594.

[15] *Santa Fe*, 530 U.S. at 302; *Mergens*, 496 U.S. at 248-50.

[16] *Mergens*, 496 U.S. at 250 (plurality opinion); *id.* at

260-61 (Kennedy, J., concurring in part and in judgment).

[17] *Rosenberger*, 515 U.S. at 845-46; *Mergens*, 496 U.S. at 248 (plurality opinion); *id.* at 260-61 (Kennedy, J., concurring in part and in judgment).

Supreme Court, U.S.
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No. 02-1709

IN THE

Supreme Court of the United States

NICHOLAS LASSONDE,

Petitioner,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was selected by public school officials to present a speech at his public high school commencement. The school controlled all aspects of the graduation including control over the content of Petitioner's commencement presentation. The public school authorities prevented the Petitioner from delivering a Christian sermon in his speech. This matter presents the following questions:

1. Whether public schools officials can properly prevent a student speaker from engaging in blatant sectarian Christian proselytizing at a public high school sponsored and controlled graduation ceremony in order to avoid violation of the Establishment Clause.[1]

2. Whether public school officials can avoid violation of the Establishment Clause by issuing a writing disclaiming religious endorsement under these facts.

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1. This question was answered affirmatively by the Ninth Circuit in *Cole v. Orville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001).

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STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner was a chosen speaker at a public high school graduation ceremony whose speech was censored and redacted because and to the extent that it contained Christian Proselytizing. Petitioner filed this action claiming that the actions of the school and it's official violated his constitutional rights to free speech and religious freedom contrary to the provisions of 42 U.S.C. § 1983 and State Law.

B. Counter Statement Of Facts

While Petitioner's rendition of the facts in this matter is generally accurate, it omits significant facts, which have a bearing both on the questions presented and on the statement of facts upon which the petition is based. This case was decided at the trial court level on defendant's motion for summary judgment. The trial court based its decision upon the lack of a genuine dispute as to the material facts before it. *Lassonde v. Pleasanton Unified School District*, 167 F. Supp. 2d 1108, 1110 (N. Dist. Cal. 2001), App. B3. The trial court very briefly summarized the facts undisputed by the parties. *Lassonde*, 167 F. Supp. 2d at 1109-1110, App. B1-B3. In it's de novo review, the appellate court did the same. *Lassonde v. Pleasanton Unified School District, et al.*, 320 F.3d 979, 981-83 (9th Cir. 2003), App. A2-A5. Petitioner did not ask either the trial court or the appellate court to review its factual findings and has made no claim of error in that respect.

As the trial and appellate courts found, the school district and it's principal maintained control over all aspects of the graduation ceremony, including primary control of the content of graduation speeches. *Lassonde*, 320 F.3d at 981, App A2; *Lassonde*, 167 F. Supp. 2d at 1112, App. B8.

The Petitioner's "questions presented" suggest that the Petitioner maintained "primary control" of the content of his graduation speech. The record clearly shows to the contrary. The control of the contents of all graduation speech, the control of all aspects of the graduation, the presentation and promotion of the graduation ceremony in all other aspects were fully and firmly in control of the Respondents.

Petitioner also suggests that his speech was merely a presentation of a "religious viewpoint" which expressed Petitioner's desire for his fellow graduates to "develop a personal relationship with God through Christ in order to better their lives." Petitioner's questions presented, II; Petition at page 3; Petitioner's District Court Complaint, ¶19, App. D6. This statement mis-characterizes the facts. The portions of Petitioner's speech, which district officials excised, were as follows:

> I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of "modern society."
>
> As Psalm 146 says, "Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea and everything in them-the Lord who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the Lord loves the righteous. The Lord watches over the alien and

> sustains the fatherless and the widow, but he frustrates the ways of the wicked". . .
>
> . . . "For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." Have you accepted the gift, or will you pay the ultimate price? . . .

Lassonde, 320 F.3d at 981, App. A2-A3; D15-D16.

This can hardly be described as merely expressing a "religious viewpoint". Nor can this proposed speech be merely described as "Petitioner's desire for his fellow graduates to . . . better their lives." Rather these statements are the sort of material one might expect to hear from a christian pulpit, as a call to the faithful to follow their beliefs, but not from the platform of a public high school commencement ceremony as a call to join and follow the speaker's sectarian belief.

Finally, Petitioner did in fact distribute the full text of his speech outside of the ceremony as the Respondents agreed that he could so that he was able to deliver his message without the appearance of school district imprimatur of its clearly religious content. App. A4, B3.

C. Procedural History

The Petitioner's statement of the procedural history of this matter is largely correct.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between The Circuit Decision In This Matter And The Provisions Of 20 U.S.C. § 7904

Petitioner proposes an imaginary conflict between the Ninth Circuit ruling in this case and the provisions of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, as found in 20 U.S.C. § 7904(a). The gist of the Petitioner's argument on this point is that the Ninth Circuit's decision is directly contrary to the "guidance" issued by the Department of Education pursuant to 20 U.S.C. § 7904(a) such that any school which controls the content of student commencement speeches cannot receive funds under the act. Petitioner argues that because the guidance suggests that school authorities may not censor the content of student graduation speeches where the students retain "primary control over the content of their expression", school districts which censor speech in the manner done by Respondent cannot certify in good faith that they "have no policy that prevents or denies participation in constitutionally protected prayer" as required for receiving federal funds pursuant to 20 U.S.C. § 7904(b).

This argument is mistaken for two important reasons. First Petitioner mistakenly assumes, contrary to the facts he admitted and were found by both the trial and appellate courts in this matter, that he maintained the "primary control over the content" his speech. As noted above, Petitioner has made this incorrect factual assertion in the "questions presented" to this court as a basis for invoking its jurisdiction. The Petitioner never had "primary" control of the content of his speech. The Pleasanton Unified School District acting through the school principal, maintained control of all aspects of the commencement ceremony, including "primary control" over the content of Petitioner's

speech. In order for Petitioner to have had "primary" control over the content of his graduation speech, the school district would have had to adopt a "hands off" policy towards graduation speeches, which it did not. Therefore, any school district operating within the territory of the Ninth Circuit which maintains control over the content of student commencement speeches will not be in conflict with the Department of Education current "guidance" under 20 U.S.C. § 7904(a) and will be able to certify in good faith that it does not have a policy that unconstitutionally interferes with protected prayer. Controlling graduation speech content is not prayer interference.

The second and more obvious reason is that the Ninth Circuit decision has nothing to do with constitutionally protected prayer. Petitioner Lassonde was not exercising his constitutional rights to pray at the graduation ceremony. Rather, Petitioner was trying to deliver a christian sermon to the graduation audience and asking them to choose between following him in his belief in Jesus Christ as Lord or face, as the only other alternative, a doomed life. Petitioner's blatant attempt at sermonizing on the graduation stage had nothing to do with Petitioner's prayer rights under the Constitution.

II. The Ninth Circuit Decision In This Matter Does Not Create A "Split" Among The Circuits Requiring Reconciliation By This Court

Petitioner argues that the decisions of the Eleventh Circuit in *Adler v. Duvall County School Board*, 250 F.3d 1330 (11th Cir. 2001) and that of the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992) are directly at odds with the Ninth Circuit decision in this case and the decision of the Third Circuit in *ACLU v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471

(3d Cir. 1996). This alleged "split" among the Circuits is an illusion invented by Petitioner. The decisions of the Eleventh and Fifth Circuits turn on the application of this court's analysis in *Lemon v. Kurtzman*, 43 U.S. 602 (1971) and application of the tri-partite test contained therein, to determine whether particular school board policies respecting commencement facially violate the establishment clause. The decision of the Third Circuit applying the decision of this court *in Lee v. Wiseman*, 505 U.S. 577 (1992) invalidated a school district ceremony benediction policy which was significantly factually different than the polices at issue in the Fifth and Eleventh Circuit decisions. The decision of the Ninth Circuit in this matter did not address the issue of policy at all and was solely concerned with a "free exercise" violation on very specific facts.

In *Adler v. Duval County School Board*, *supra*, and *Jones v. Clear Creek Independent School District*, the Eleventh and Fifth Circuits approved school policies which allowed students to choose graduation invocations and benedictions independent of any control by school authorities, provided that such exercises were "non-sectarian" and "non-proselytizing".

In *ACLU v. Black Horse Pike Regional Board of Education*, *supra*, the Third Circuit struck down a policy promoting student selected prayer at graduation ceremonies, which policy did not limit the student invocations or benedictions to "non-sectarian or non-proselytizing" statements. The Third Circuit decision was based on the "coercion" analysis in *Lee v. Wiseman*, *supra*. Based upon the factual distinctions between the decisions of those three Circuits, it cannot be said that prior to the Ninth Circuit's decision in this case a split existed between the decisions of the Eleventh, Fifth and Third Circuits on the issue of prayer at school graduation ceremonies.

The decision of the Ninth Circuit does not create a split. The facts of this case raise no issue implicating school district graduation prayer policy and no such claim is advanced in Petitioner's complaint filed with the district court. (App. D1-D16) Indeed, Petitioner maintained from the outset that neither he nor his legal counsel were ever aware of any school policy respecting the content of his graduation speech. (*See, e.g.*, Plaintiff's Additional Uncontroverted Material Facts, Fact number 12, App. G9)

Also, Petitioner's argument significantly ignores the fact that the Ninth Circuit issued a similar ruling on nearly identical facts in *Cole v. Orville Union High School District*, 228 F.3d 1029 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001). *Cole*, apparently, did not create a "split" anymore than this matter does. Indeed based on the holding in *Cole*, the issues in this case appear to be well settled.

Petitioner attempted to insert a Christian sermon and not a prayer in his graduation speech, the content of which was subject to the primary and ultimate control of the Respondents. The coercive effect recognized in *Lee v. Wiseman*, *supra*, would have been present at the graduation had Petitioner been permitted to deliver his sermon. The holding of the district court, affirmed, by the Ninth Circuit, did not create any split among the decisions of the Circuits on this issue. No Circuit has upheld the right of a student to deliver a Christian sermon as part of a school controlled commencement speech at a public high school graduation.

III. The Ninth Circuit Decision Is Not An Unwarranted Extension Of Existing Precedent Of This Court And A Written Disclaimer Would Not Have Avoided A Violation Of The Establishment Clause

The Ninth Circuit's decision in this matter is wholly consistent with the principles enunciated by this court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) and *Lee v. Wiseman*, *supra*, and reaffirms the Circuit's earlier decision in *Cole v. Orville Union High School District*, *supra*.

In *Santa Fe*, this court held that a school district policy authorizing a student elected by student vote to deliver a non-sectarian and non-proselytizing "statement or invocation" at varsity football games, violated the Establishment Clause. This court reasoned that such a practice would entangle the district impermissibly because the district's control over the activity and invocation would not only cause an objective observer to perceive that the district was endorsing the religious message in the invocation, but also would create an actual endorsement of religion by the public school. In *Lee*, this court barred a school district from inviting a Rabbi to deliver a non-sectarian, non-proselytizing prayer at its graduation ceremony. The court observed that high school graduation was a once in a lifetime event of singular importance and that adolescents were susceptible to peer and social pressure such that a dissenting student, not in agreement with the notion that state sanctioned prayer should be delivered at graduation, would be faced with the coercive dilemma of participating in the prayer against his or his conscience or missing his or her own high school graduation. In *Cole v. Orville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001), The Ninth Circuit upheld a bar against a high school speaker from delivering a proselytizing christian sermon at a public school graduation ceremony by

applying the reasoning of *Lee* and *Santa Fe*. It was imperative here that the high school principal censor Petitioner's speech to prevent him from exhorting the assembled crowd to follow his particular religion or religious ideal, in this case, his Lord, Jesus Christ. Permitting Petitioner to preach to the school assembly in a blatant attempt to persuade them to follow his sect or creed would be a direct violation of the establishment clause as understood and explained in both *Santa Fe* and *Lee*. The Constitution does not confer upon Petitioner a special right or benefit to sell his brand of religion to a captive audience at a governmental ceremony, which has been convened for wholly non-sectarian purposes.

Petitioner argues that the "coercive effect" theory should not apply here because there is a distinction between forcing a non-adherent to listen to "prayer at a graduation as opposed to be forced to listen to pure speech" presumably including Christian sermonizing (with respect to its coercive effect). In the case of the former, Petitioner argues, a non-adherent who is forced to maintain a respectful silence along with others during a group prayer might feel that he or she has been subtly coerced into participating in the prayer. Whereas one who remains courteously silent during the exercise of "pure speech" (read: Christian sermon) is not equally coerced. This is a distinction without a difference.

Non-adherents in the audience who would have been forced to listen to Petitioner exhort them to join the Christian religion and follow his belief in Jesus Christ, his Lord, are not listening to "pure speech" or Petitioner's "views" but instead are forced to listen to a sermon and call by Petitioner to join and follow his creed. The "coercive effect" would be in place.

The Ninth Circuit correctly determined that no form of "disclaimer" could cure this coercive impact as Petitioner continues to suggest. Even with a disclaimer, the coercive dilemma remains: non-adherent students are given the unsatisfactory choice between attending the graduation ceremony and listening to a repugnant religious message or skipping an important life experience to avoid the offensive speech.

CONCLUSION

The petition should be denied because there is no sound reason for granting it. The Ninth Circuit's decision does not implicate the ability of any school to obtain federal funding for educational purposes, does not create a split among the Circuits that requires the intervention of this court, and, in view of the Ninth Circuit's earlier decision in *Cole v. Orville Union High School District*, *supra*, the decision in this case does not represent "an unwarranted extension" of this court's decisions in *Lee v. Wiseman*, *supra*, and *Santa Fe Independent District v. Doe*, *supra*.

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IN THE
SUPREME COURT OF THE UNITED STATES

NICHOLAS LASSONDE,
Petitioner,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. PETITIONER MAINTAINED "PRIMARY CONTROL" OVER HIS SPEECH WITHIN THE MEANING OF THE DEPARTMENT OF EDUCATION GUIDELINES DESPITE RESPONDENTS' PRIOR REVIEW OF THE SPEECH.

In countering Petitioner's argument that the Ninth Circuit Court of Appeals' holding places school districts between the pincers of potential liability for violating the Establishment Clause on the one hand and revocation of federal funding under the No Child Left Behind Act (20 U.S.C. § 7904(a)) on the other, Respondents suggest that their behavior does not contravene the Act because at all times they maintained "primary control" of Petitioner's speech within the meaning of the Department of Education Guidance.[1] Yet this interpretation of "primary control" would undermine the rationale of the Act and the regulations promulgated thereunder, and is contrary to the ordinary and accepted meaning of the word "primary" in everyday language.

If Respondents preserved "primary control" over the speech merely by requesting to review it prior to the graduation ceremony in order to exercise their constitutionally permissible authority over profane content , *see Bethel v. Fraser*, 478 U.S. 675, 686 (1986) (holding that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech... would undermine the school's basic educational mission"), then it follows that a student may retain "primary control" of his speech only when his school adopts a comprehensively permissive attitude toward his speech and does not review its content prior to delivery. But the Department's Guidance explicitly contemplates a situation in which a student retains "primary control" of his speech and a school restricts its religious content:

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[1] - Respondents' Brief in Opposition, at 2.

> [W]here students or other private graduation speakers are selected on the basis of neutral, evenhanded criteria and retain primary control over the content of their expression... that expression... may not be restricted because of its religious (or anti-religious) content.

Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, February 7, 2003, Appendix to Petition ("App.") at J6.

Moreover, the Guidelines expressly repudiate Respondents' strained interpretation of "primary control." The Department observes that "local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities...." *Guidance on Constitutionally Protected Prayer*, App. at J6.

> For example, the First Amendment permits public school officials to review student speeches for vulgarity, lewdness, or sexually explicit language. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-86 (1986). *Without more, however, such review does not make student speech attributable to the state.*

Id., at n.13, App. J12-J13 (emphasis added). Even when exercising such discretion, the DOE cautions, school authorities "may not structure or administer such rules to discriminate against student prayer *or religious speech*." *Id.* (emphasis added).

Under Respondents' interpretation of "primary control," a student could not retain "primary control" over his speech and at the same time subject its content to school review and potential restriction. Respondents' definition of "primary control" plays both sides of the fence, making the conditions of "primary control" and "school review" mutually exclusive when the Act clearly does not mandate this reading. Petitioners respectfully submit that the concept of "primary control" must be understood not as exhaustive control but as rhetorical license subject to legitimate review.

The ordinary meaning of the word "primary" reinforces this definition, since the word "primary" naturally contemplates the existence of something "secondary" to it. "Primary control," therefore, cannot mean "exhaustive control." Respondents' policy cannot be reasonably interpreted as "primary" and Petitioner's work "secondary," when Respondents merely required that Petitioner eschew the use of profanity and that he submit the speech for review prior to delivery, ostensibly to ensure that Respondents' single explicit directive had been followed. Petitioner conceived a concept for the speech, outlined its rhetorical structure, wrote and revised it, and prepared to deliver it at his graduation ceremony. Petitioner's control over the speech from beginning to end clearly supervened in importance and responsibility over Respondents' right of review. The latter was merely a formality; the former was an act of literary creation.[2] Accordingly, it cannot be said that in any sense Respondents retained "primary control" over the theme or content of Petitioner's speech.

II. THE DEPARTMENT OF EDUCATION'S GUIDANCE PROTECTS A RANGE OF RELIGIOUS SPEECH WHICH INCLUDES BUT IS NOT LIMITED TO FORMAL PRAYER.

Respondents assert that Petitioner's graduation speech "has nothing to do with constitutionally protected prayer," and draws from this statement the conclusion that Petitioner's speech is not protected by the No Child Left Behind Act. Even a cursory review of the Guidance, however, reveals that the text of the Guidance

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[2] Moreover, Respondents should not be permitted to censor private religious speech under the guise of exerting control over the student graduation speeches. *Cf. Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) ("petitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students").

draws its purview substantially broader:

> [T]he *speech* of students who choose to express themselves through religious means *such as prayer* is not attributable to the state and therefore may not be restricted because of its religious content. Student *remarks* are not attributable to the state simply because they are delivered in a public setting or to a public audience.

Guidance on Constitutionally Protected Prayer, App. at J6 (emphasis added). Obviously, "speech" and "remarks" are not "prayer." Moreover, a footnote to this portion of the Guidance specifically deals with the constitutional implications of prayer as an "additional" form of religious expression. *Id.*, n.14, App. at J13. Certainly, if the Act had only contemplated prayer, its drafters would have used that term instead of "speech" and would not have conveyed protection to "nonreligious" and "anti-religious" expression, since the notion of "anti-religious" prayer is an absurdity. Thus, Petitioner's religious speech clearly falls within the ambit of the Act, and Respondents' restriction of that speech exposes them to liability for the range of sanctions available to the Department of Education.

III. The Split Between the Circuits Is Clear And Warrants Supreme Court Review.

Respondents' attempt to reconcile *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) with the instant case and its progenitor, *Cole v. Oroville Union High Sch.*, 228 F.3d 1092 (9th Cir. 2000), turns on the incorrect assertion that the *Adler* policy limited student speech to "non-sectarian" and "non-proselytizing" speech. As the Eleventh Circuit noted time and again, the Duval County policy under review in *Adler* was facially neutral with regard to religion. 250 F.3d at 1331, 1334, 1337. Graduating seniors were permitted to vote whether or not a member of their class should give a "message" before or after graduation and, if so, what student to select for the task. 250 F.3d at 1332. The policy did not limit student speech to "non-sectarian" or

"non-proselytizing" content; it made absolutely no mention of such strictures. *Id.* Nor did it mention "invocations" or "benedictions." *Id.* In fact, that the policy did not mention prayer at all is one of the essential facts upon which the Eleventh Circuit rested its conclusion that the commencement oration amounted to "private speech" and did not trigger coercion concerns:

> [T]he text setting forth the Duval County policy contains no language approving an "invocation" and no other provision that could fairly be read to require or approve a "religious" theme. [This]... demonstrate[s] why... the speech at issue here... cannot reasonably be described as state "coercion" of religion.

Id. at 1337-39.

Like the *Adler* policy, Respondents' general policy was facially neutral toward religion. Petitioner was selected according to a neutral, secular criterion (his grade point average) and was given a single, unremarkable guideline for the content of his speech (that it not be profane) – a guideline he unquestionably followed. Despite this initially reasonable and balanced approach, when Respondents, upon later review, elected to edit Petitioner's speech of its religious references, the Ninth Circuit upheld this straightforward act of content-based censorship, construing it as necessary to avoid an Establishment Clause violation. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003) (quoting *Cole*, 228 F.3d at 1101).

The conflict between the Eleventh Circuit's holding in *Adler* permitting religious expression and the Ninth Circuit's holdings in *Cole* and *Lassonde* requiring censorship of religious expression is clear. On the one hand, the Eleventh Circuit upheld the *Adler* policy despite Establishment Clause challenge because (1) the student speech under review was purely private and therefore did not trigger coercion concerns, and (2) the policy did not afford room for school censorship of disfavored minority opinions. *Adler*, 250 F.3d at 1339. On the other hand, the Ninth Circuit in

Lassonde upheld on Establishment Clause grounds Respondents' decision to turn a neutral policy of permissiveness toward commencement speech content into an act of religious censorship because it decided that Petitioner's speech amounted to a "religious practice" and thus "compelled a dissenter's implicit participation." *Lassonde*, 320 F.3d at 984. In both cases the speech considered was written and delivered by a student selected according to neutral criteria. In both cases the schools were, at best, only nominally involved in setting boundaries for student speech content. Reviewing strikingly similar circumstances, the two Circuits came to starkly conflicting conclusions regarding the coercive effect of religious speech under those circumstances.

Respondents assert that Petitioner's speech was "sectarian" and "proselytizing" and thus should be treated differently from the student speech under review in *Adler*. Brief in Opposition, at 6, 8-9. But this distinction actually militates against Respondents' claim of harmony between *Adler* and *Lassonde*. The Eleventh Circuit was not concerned with the religious content of the speech itself, but rather with the school's official involvement in controlling that content. *Adler*, 206 F.3d at 1083-84 ("whether unconstitutional coercion exists "is largely determined by the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself"). When, therefore, the Eleventh Circuit determined that the school was not in control of the speech, it looked no further at the speech's content and held that the school's policy did not raise coercion concerns. 206 F.3d at 1083-84; *accord Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000), *cert. den.*, 533 U.S. 916 (2001) ("Private speech endorsing religion... is not unconstitutionally coercive even though it may occur before non-believer students."). The Ninth Circuit, on the other hand, relied prominently on the "proselytizing" content of Petitioner's speech, coupled with Respondent's "plenary control over the graduation ceremony." 320 F.3d at 983-84, quoting *Cole*, 228 F.3d at 1103. This approach the Eleventh Circuit explicitly foreswore. *Adler*, 206 F.3d at 1083. Because the Ninth Circuit found Petitioner's speech to be "proselytizing," it held that coercion analysis applied to substantiate Pleasanton's decision to censor its

religious content. Thus, it is readily apparent that the two Circuits implemented fundamentally different methodological approaches to coercion analysis and came to opposite conclusions. Moreover, these conclusions have established contrary constitutional regimes for public school graduation expression. In the states comprising the Eleventh Circuit, private religious expression, whether prayer or pure speech, "proselytizing" or non-sectarian, is tolerated, and the Establishment Clause does not require a different result; in the states comprising the Ninth Circuit, private religious expression must be censored in subjection to the Establishment Clause.

In view of the above, Petitioner respectfully submits that review by this Court is necessary to resolve the split among the Circuits on the question whether the Establishment Clause requires censorship of religious content in graduation speeches where the speakers are selected according to neutral criteria and the school adopts a primarily permissive posture toward the content of the speech. Moreover, the Circuits require guidance in ascertaining the relative importance of message content and school involvement in regulating that content insofar as these factors relate to coercion analysis.

IV. A Student Graduation Speech Is Not a Collective Exercise Eliciting Audience Participation, And Therefore Coercion Analysis Is Inapposite.

Attempting to rebut Petitioner's argument that the coercion analysis developed by the Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992), should not obtain when considering the effect of a student's religious speech upon his audience, Respondents argue (and the Ninth Circuit contends) that collective prayer led by a school-appointed minister and religious speech by a student appointed by virtue of his grade point average are of the same piece. Brief in Opposition at 8-10. *See Lassonde*, 320 F.3d at 984 (holding that "proselytizing, no less than prayer, is a religious practice.") (*quoting Cole*, 228 F.3d at 1101). Both Respondents and the Ninth Circuit fail to grasp the fundamental difference between the two kinds of speech the difference upon which the

result in *Lee* substantially turned.

The record in *Lee* itself demonstrates that an invocation given before a group is by its very nature a collective exercise. There Rabbi Gutterman explicitly used the collective pronoun "we" to thank the "God of the Free" for an enumerated list of blessings. 505 U.S. at 581-82. The rabbi was thus not only praying on his own behalf, but was also invoking Divine blessing and guidance on behalf of the entire audience, and especially on behalf of the graduating students. This is the nature of an invocation; it presumes the accord and participation of the audience. This fact formed the core of the Court's psychological coercion test. As the Court wrote in *Lee*, "There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise." 505 U.S. at 593.

A student's speech, on the other hand, is not in any sense a collective exercise, but rather is an expression of the views and wishes of the speaker alone. As Petitioner argued in his Petition for Writ of Certiorari, "it defies logic to assume that one who remains silent while another person addresses an audience via pure speech would reasonably feel that he or she has 'participated' in the speech." Petition at 24. In their Brief in Opposition, Respondents contest Petitioner's characterization of his address as "pure speech," and instead attempt to construe it as a "proselytizing christian (sic) sermon" for the purposes of coercion analysis. Brief in Opposition, at 5. But this characterization fails to do the logical work Respondents demand of it. Even if Respondents are right in calling Petitioner's speech a sermon, a sermon is no more a collective act than is a speech. Both use words to promote ideas, but neither is a group exercise in which an audience can reasonably be said to participate in the way contemplated by this Court in *Lee*.

V. RESPONDENTS' AND THE NINTH CIRCUIT'S INSISTENCE THAT PETITIONER'S SPEECH WAS "SECTARIAN" AND "PROSELYTIZING" IS BY ITS VERY NATURE CONTENT-DISCRIMINATORY AND

CONTRAVENES THE COURT'S CLEAR PRECEDENT.

In their "Counter Statement of Facts," Respondents assert that Petitioner's original speech was "a call to the faithful to follow [Christian] beliefs." Brief in Opposition, at 3. Elsewhere Respondents sharply denounce Petitioner's choice of language as "sermonizing" and "proselytizing" and opine that non-adherents would find it "repugnant" and "offensive." *Id.*, at 9-10. Aside from the unfortunate tone of such characterizations, Respondents (and the Ninth Circuit) fail to grasp that such viewpoint-based descriptions cannot form the basis for First Amendment analysis of religious speech. Proselytizing or non-proselytizing, sectarian or non-sectarian, private speech from a religious viewpoint is protected in all circumstances where speech of any other viewpoint is permitted, while government speech endorsing religion is not. See *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Evangelism is protected, core First Amendment speech. *See Good News Club v. Milford Central Sch.*, 533 U.S. 98, 125-26 (2001); *Rosenberger*, at 844 (referring approvingly to the dissent's description of the paper as a "work characterized by... evangelism," but noting it protected nonetheless); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). "Proselytizing" is merely a dirty word for "private speech endorsing religion," which the First Amendment clearly protects. *Mergens*, 496 U.S. 250.

Furthermore, the content-based review exercised by Respondents and upheld by the Ninth Circuit is facially offensive to the Establishment Clause, inasmuch as it requires schools and courts to engage in an extensive analysis of religious speech, which (1) necessarily entangles schools in religious matters in violation of the third prong of the *Lemon* test (see *Lemon v. Kurtzman*, 403 U.S.

602, 613 (1971)) and (2) demands that courts distinguish among different forms of religious speech, a task the Supreme Court explicitly considered suspect in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("to determine which words and activities fall within 'religious worship and religious teaching' could prove an impossible task....").

CONCLUSION

For the reasons set forth hereinabove, Petitioner Nicholas Lassonde respectfully requests that the Court grant certiorari to review the decision of the Ninth Circuit Court of Appeals.

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